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T R E A T I S E

ON THE

L A W S

CONCERNING THE

ELECTION of the different Representatives  
sent from SCOTLAND to the Parliament of  
GREAT BRITAIN.

WITH

A Preliminary VIEW of the Constitution of the  
Parliaments of ENGLAND and SCOTLAND, before  
the Union of the two Kingdoms.

B Y

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ALEXANDER WILSON

D. D.

The Union of the Kingdoms

of Great Britain and Ireland

and the Town of Berwick

on the 1st of January

1852

and the 1st of January

1853

1854

1855

1856

1857

1858

TO THE  
RIGHT HONOURABLE  
W I L L I A M  
L O R D M A N S F I E L D,  
Lord Chief Justice of England, &c. &c.

The following Treatise is,

With the greatest respect,

Inscribed, by

His Lordship's most obedient

And most humble servant,

ALEXANDER WIGHT.

TO THE

HONOURABLE

WILLIAM

LORD MANSFIELD

Lord Chief Justice of England

The Hon. Mr. Justice

Wm. Mansfield

Esq.

The Hon. Mr. Justice

And now please my Lord

Yours most obedient servant

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## INTRODUCTION.

**G**REAT BRITAIN is the only monarchical state now existing, where the rights and privileges of the subject are, by the constitution, perfectly secured against the incroachments of the prince; and where no law can be made, or tax imposed, without the consent of representatives chosen by the people themselves.

Altho' the bringing this admirable constitution to that degree of perfection it has now attained, has been the work of many ages, the seeds of it are to be discovered in the annals of those nations that overspread Europe upon the declension of the Roman empire, and whose customs and manners made so remarkable an alteration upon the face of that quarter of the globe. Men, who from their infancy had imbibed the spirit of liberty and independence, and allowed superior command only to superior merit, real or supposed, were not formed to yield

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to



## 2 INTRODUCTION.

to the unlimited controul of a single ruler, or to submit to the arbitrary dictates of one whom they themselves had elevated to distinction. Hence, in all the new kingdoms established in Europe, upon the irruption of the northern nations, the power of the monarch, at first only the leader of the conquering army, was of a very limited nature: Nothing of moment was done or undertaken, but with the advice of the great and leading men, the *proceres regni*, who formed a body known by different names in different countries. The Cortes in the kingdoms of Arragon and Castile; the annual assemblies held in France under the names of *Les Champs de Mars*, and *Les Champs de Mai*; afterwards succeeded by the States General; the Wittenagemot in England during the Anglo-Saxon government, were all of one origin; and, being invested with the highest authority, rendered the power of the kings more the shadow than the substance of regal dominion.

It must not, however, be supposed, that, in the ages to which I now refer, the whole  
body

## INTRODUCTION. 3

body of the people were free and independent. The idea of an universal political liberty was then unknown. It was inconsistent with the feudal system that took place in the new kingdoms of Europe ; and no example of a constitution, formed upon a basis so excellent, appeared, till that system had greatly declined, and had been in a manner totally obliterated.

Neither must we suppose, that the same identical mode of government took place in each of the several kingdoms, formed upon the ruins of the Roman empire ; or that the aristocratical liberty, with which each was at first influenced, continued to produce the same effects in all. In some, the power of the monarch was more, and in others less limited. In some, the national council was composed only of a few great and leading men ; in others it was more diffused, comprehending a greater part of the body of the people. The circumstances of situation, climate, soil, commerce, and religion, the dispositions and talents of princes, the factions amongst the great men,

#### 4 INTRODUCTION.

tended, in the course of years, to introduce revolutions in the political system, and to form new constitutions of government : So that, while one nation daily improved, and at last brought its political liberty to the highest lustre, others gradually declined, and in the end sunk under the abject yoke of absolute monarchy.

To point out the various revolutions in government that have taken place in the different nations of Europe, and to trace the causes of these revolutions, would be to write the history of many ages. The reader may consult other authors on that subject ; which, tho' entertaining to a philosophic and inquiring mind, is not necessarily connected with the view or intention of this treatise : It will be sufficient for my purpose, to give a short sketch of the rise and progress of parliament in this island.

TITLE

## T I T L E I.

### Of the English Parliament.

**A**UTHORS differ much with regard to the word *Parliament*. Some derive it from the French, others from the Celtic\*; but all agree that it was unknown in England prior to the Norman conquest; nor do we find it in use till the reign of Henry III. Hence Craig, in his valuable treatise *De Feudis*, has been led to observe, that parliaments were first introduced by that prince: But, although the great council of the nation was, during his reign, brought nearer to the plan upon which parliament is now established; those who suppose that, prior to this period, the kings of England were possessed of absolute power, or unlimited authority, must be little versed in the history of that kingdom.

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What

\* See Barrington's Observations, p. 67.



What particular form of government took place in Britain, or, to speak more properly, in the different states in Britain, prior to its becoming a Roman province, can only be a matter of conjecture. We look in vain for certainty in ages so dark and remote. But as, in all probability, this island was peopled from Gaul, it is natural to suppose that the same manners and customs would be introduced which prevailed in that part of the continent whence the first settlers came, and which are so well described by the two best historians that their own, or perhaps any age has produced, Caesar and Tacitus.

While Britain remained under the power of the Romans, it would no doubt be subject to their government and laws, like any other province; but, when they were obliged to abandon it, in order to preserve countries nearer the seat of empire, and the luxurious and effeminated Britons were overpowered by the Saxons, whom they had invited to assist them against the incursions of the Picts and Scots, the form of government,  
to

to which these new conquerors had been accustomed, would naturally take place. We accordingly find, that, even during the heptarchy, all matters of public concern were transacted by the king, with the advice of the great council of the nation, which was held under the several names of *Michel-synoth*, or great council, *Michel-gemote*, or great meeting, and more frequently, *Wittena-gemot*, or the meeting of the wise men.

After the union of the different kingdoms that composed the heptarchy, King Alfred ordered this national assembly to meet twice in the year, or oftner, if necessary; and, as the succeeding Saxon and Danish monarchs held frequent councils of this sort, for the purpose of enacting laws; so, from the titles prefixed to these laws, we may safely conclude, that both the king and the great council were understood to have a joint, and neither of them an exclusive authority, in matters of that kind \*.

A 4

Who

\* The preamble to the laws of Edgar is thus expressed:  
' Haec sunt instituta quae Edgarus Rex consilio sapien-

Who were the constituent members of this great council, our best antiquaries have not been able with certainty to decide. It is agreed on all hands, that the bishops and abbots, and the aldermen, or governors of counties, were admitted to it; and it is natural to suppose that the judges, or men learned in the law, would likewise make part of an assembly of that kind. It is also probable, that the more considerable proprietors of land would be intitled to a seat in this national council; but I can see no certain ground for concluding, that, in those days, there was any such thing known as a representation of boroughs: The cities were then little better than villages; and the nature of government favoured too much of aristocracy to countenance such a representation†.

The

‘tum suorum instituit.’ The laws of Ethelstan are entitled, ‘Haec sunt judicia quae sapientes consilio Regis Ethelstani instituerunt.’ And those of Edmund, ‘Haec sunt institutiones quas rex Edmundus et episcopi sui, cum sapientibus suis, instituerunt.’

† See Brady’s treatise of English boroughs, p. 3. 4. 5. &c.

The Norman conquest is a remarkable aera in the English history, and could scarcely fail to produce at least a temporary revolution in the internal polity and constitution of that kingdom. William, though he founded his title to the crown, both upon a pretended will of King Edward, and upon a supposed election of the people, still retained the idea and manners of a foreign conqueror. He, for a time, indeed, shewed great affability and regard to his new subjects; but he took care to place all real power in the hands of his Norman followers: And the commotions that happened after he left the kingdom, on his first expedition to Normandy, furnished him, at his return, with a pretext for using the English with much rigour. This produced new insurrections; but these proving unsuccessful, only gave a handle for still greater severity; and, by the confiscations which followed, added considerably to his power, and enabled him, even with some show of justice, to gratify the rapacity of the Normans. He accordingly stripped the natives almost entirely of their property; and, establishing



establishing the feudal system over the whole kingdom, as it then subsisted in France and Normandy, he divided all the lands in England, exclusive of the church-lands and the royal demesnes, into about 700 baronies, which, with the reservation of the ordinary feudal services, he bestowed upon the most considerable of his Norman followers; and these again parcelled out part of the lands so conferred upon them to other foreigners, who were denominated knights or vassals, and paid the barons the same services and submission which they themselves paid to the sovereign. Nor did William stop here; he reduced the ecclesiastical revenues under the same feudal government, and obliged the bishops and abbots to furnish, during the time of war, a certain number of knights, or military tenants, proportioned to the extent of territory which they possessed.

By this innovation, William's power must have become greater, and his authority more extensive than that of any of the English monarchs, during the period of the Anglo-Saxon government. The natives, either

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totally dispossessed of their lands, or glad to hold them of the Norman barons, would not be called upon to aid the sovereign with their councils; and the Normans, who came in their place, owed too much to the arbitrary sway of William, to pretend to controul his authority. Constantly employed, not only in his reign, but during the reigns of his immediate successors, either in securing themselves against the revolts of the natives, or in serving their princes in expeditions on the continent, they could not for some time acquire so firm an establishment, as to enable them effectually to repress the arbitrary dominion which these princes assumed. No sooner, however, did they begin to unite with the nation, and to gain a security in their possessions, than the natural genius and manners of the country whence they came, taught them to oppose even the appearance of despotism. And thus the very favours which the conqueror bestowed upon his followers, served to make them the more formidable to his posterity.

We

We must not, however, imagine that the antient mode of government suffered so material an alteration by the conquest, as to render the great council no longer a part of the constitution, or that the first kings of the Norman race were totally independent. An alteration so favourable to the crown was not easily brought about, and was indeed totally inconsistent with the feudal system, which, if William did not first introduce into England, he certainly established and confirmed. It was the privilege, as well as the duty of all those who held *in capite* of the sovereign, to attend his great court, of which they were the peers; and, although William and his immediate descendents were not so dependent upon the will of the barons, who, from the causes above mentioned, were then only in the infancy of their power, there are many instances of these barons being summoned to attend the great council, along with the dignified clergy, who had a two-fold right to be called; first, in consequence of antient usage, during the Anglo-Saxon government; and, secondly, as being

ing themselves the King's tenants *in capite* for their fees.

But these councils differed materially from parliament, as we now understand the word. There was no election of representatives for counties or boroughs ; no separate houses of lords and commons : The bishops, and abbots, and the barons, who were the immediate vassals of the crown, were the only members of these councils, and met together in one body, to deliberate upon public affairs. Nay, what is very remarkable, instances occur of foreign barons sitting and voting in the great council of the nation ; and we find laws that were enacted in foreign parts binding upon the kingdom. Several Norman barons voted in the great council, which was summoned in 1164, by Henry II. for the purpose of trying Thomas a Becket \*, and one of the most equitable laws made in that prince's reign, forbidding the goods of a vassal to be seized for the debt of his lord, unless the vassal were surety for the debt, and ordering the rents of vassals to be paid to the  
cre-

\* Fits-Steph, p. 36.



creditors of the lord, and not to the lord himself, passed in a council which was held at Verneuil, and consisted of some prelates and barons of England, and others of Normandy, Poitou, Anjou, Maine, Touraine, and Brittany; and took place in all these different territories \*.

While the immediate vassals of the crown continued to be few in number, there was no room for representatives; but, in time, they became too numerous to meet together in one body. Those who had only small fees were likewise apt to consider attendance in the great council as a hardship, and accordingly wished

\* Bened. Abb. p. 248. This author does not indeed positively say, that this law was ordered to be observed in England; but, as all the other countries mentioned by him were equally independent of each other, there is no reason to suppose that it did not extend to England as well as to the rest. His words are, ‘Hoc statutum et consuetudinem statuit Dominus Rex, et teneri praecepit in omnibus villis suis, et ubique in potestate sua, scilicet, Normannia, et Aquitania, et Andegovia, et Britannia, generale et ratum.—Et, ut hoc statutum firmiter teneretur, et ratum permaneret, scripto commendari, et sigilli sui auctoritate confirmari fecit.’

wished to avoid it. Some denied their tenors, on purpose to get free of the burden ; and others used interest to obtain charters to exempt them from serving in parliament \*.

These causes, joined to the great alteration made upon the state of boroughs by the Norman princes, who bestowed upon them territories in property, holding immediately of the crown, and by the accession of wealth, which growing industry and commerce produced amongst their inhabitants, naturally occasioned a remarkable variation in the constitution of the great council. The ecclesiastical dignitaries and the great barons continued to attend in person. The lesser barons deputed a certain number from each county to represent their body ; and the boroughs, as immediate tenants of the crown, were likewise permitted to send representatives to the national assembly.

At what precise period this new establishment first took place, does not with certainty appear :

\* Coke 4. inst. 49.

appear : It is commonly ascribed to that period of the reign of Henry III. when the Earl of Leicester was at the head of affairs. It appears, indeed, to be pretty evident from the charter of King John, granted in 1205, that the representation of the smaller barons had not then been introduced ; for, as by that charter the archbishops, bishops, abbots, earls, and great barons of the realm, wereto be summoned singly by the King's letters ; so all the other smaller barons, who held *in capite*, were to be summoned in general by the sheriffs and bailiffs. Neither does any thing in this charter authorise us to believe that any representation of the boroughs had at that time taken place ; and the first summons for calling the representatives of counties and boroughs, that is now extant, issued no earlier than the 49th year of Henry III. Nor does it even with certainty appear that the boroughs were regularly summoned so early. All we find is, that the cities of York and Lincoln, and other boroughs of England, were written to, and required to send two of the most discreet men ;  
and

and the first regular summons we meet with, directed to sheriffs for the election of citizens and burgeses, is in the 23d of Edward I. \*

It is equally uncertain, when the parliament of England was first separated into two different houses: That separation must, however, have taken place before the year 1376, when we find a speaker of the commons elected by them †.

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\* A late ingenious author has, in a manner, promised to the public, to exhibit a connected view of several direct arguments, which prove a representation of the commons before the 49th of Henry III. See historical dissertation concerning the antiquity of the English constitution, p. 281. I hope he will perform this promise; in the mean time, the reader may consult the history of Henry II. by Lord Littleton, who is a very warm advocate for a more early representation of the boroughs.

† It is remarkable that this speaker of the commons, whose name was Peter de la Mare, had been imprisoned and detained in custody by King Edward III. for his freedom of speech, in attacking the Mistress and the Ministers of that Prince; Hume, 3. vol. p. 3. Carew in his preface, p. 6. says, That, in the parliaments of the 18. and 22. of Edward I. the Lords and commons met together to hear the cause of calling the parliament, and when that was declared, separated in order to consider and debate apart, of the matters given in charge.

From that period, we find a regular parliament, consisting of lords and commons; the first composed of the ecclesiastical dignitaries, and the great barons or peers, who were summoned *singulatim* by the king's letters; and the second, of the representatives of counties and boroughs, who were summoned *per vicecomites*; and the only material alteration that happened with regard to either of these bodies, down to the union of the two kingdoms, (except during the time of the usurpation, when the constitution was totally unhinged), was, that, upon the dissolution of monasteries in the reign of Henry VIII. the number of the spiritual lords was greatly reduced, being thenceforth confined to the two archbishops, and twenty-four bishops; whereas formerly the mitred abbots and priors made part of that branch of the upper-house.

Having thus presented the reader with a short sketch of the origin and constitution of the English parliament; and it being no part of my plan to enter into a minute discussion of the powers or separate departments



ments of its several branches, or of the mode of election of the commons that has been there established, I shall now proceed to consider the origin and constitution of the parliament of Scotland.

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TITLE

## T I T L E II.

### Of the Parliament of Scotland.

**I**N this title I propose, in the first place, to trace the origin and the ancient constitution of parliament in Scotland; and next, to state the several changes it underwent, down to the union of the two kingdoms; after which, I shall point out in what particulars it differed most materially from the parliament of England, and attempt to explain the causes of these differences.

## S E C T I O N I.

### *Of the Origin and first Constitution of Parliament in Scotland.*

The more ancient history of Scotland, like that of all other nations, is involved  
in

in obscurity and fable. Particular circumstances have, however, concurred, to bring down that obscurity to a later period than otherwise would have happened. Of these, the destruction of many, and the abstraction of others, of the public records and monuments by Edward the first of England, if true, is not the least remarkable.

The English have the laws of their Saxon kings : The Scots do not even pretend to have any of an older date than the time of Malcolm II. who began to reign only in the year 1004; and, from the names of offices, and the titles and other vocables mentioned in the laws ascribed to that prince, there arises at least a strong presumption that they are the composition of a later age. The judicious Sir H. Spelman conjectures, that the name of Malcolm II. has been erroneously substituted by transcribers in the place of Malcolm III. whose reign commenced in 1057, only a few years before the Norman conquest \*. But there is reason to be-

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lieve

\* *Reliquiae Spelmanianae*, p. 28.

lieve that they are the production of a still later period.

Notwithstanding this darkness which attends the Scottish history, we may reasonably suppose, that the antient form of government would be similar to that which took place in England after the arrival of the Saxons, and was established in the other nations of Europe that were formed upon the ruins of the Roman empire. For, so far back as we can go, with any degree of certainty, we discover a limited monarchy, and find, that all matters of consequence or public concern were transacted, not by the king alone, but by the king and his great council; and this great council is easily traced to have been of the same nature, and composed of the same members, with the great council of England during the time of the Saxons, and the reigns of the first princes of the Norman line.

The statutes of William I. commonly called William the Lion, who began to reign in 1165, are thus titled: ‘Statuta sive assise regis Willicelmi regis Scotiae factae apud Perth  
‘ coram

‘coram episcopis, abbatibus, baronibus, et  
‘aliis probis hominibus terrae suae.’ And  
the very first chapter begins with these re-  
markable words: ‘Placuit Regi et concilio  
‘suo.’ The *episcopi*, the *abbates*, and the  
*barones* are well known; but it may be asked,  
who were understood by the general descrip-  
tion of the ‘alii probi homines terrae suae,’  
whom we likewise find mentioned as making  
part of the great council, in the 2d chap-  
ter of the statutes of Alexander II.? The  
words are no doubt extremely comprehen-  
sive; but the statutes of those two princes  
do themselves sufficiently answer the que-  
stion. In the 32d chapter of the *statuta*  
*Willielmi* there is an enumeration of the  
members of the *commune concilium*, which is  
there expressly described as consisting of the  
*praelati*, *comites*, *barones*, and *libere tenentes*.  
We may therefore safely conclude, that the  
‘alii probi homines terrae,’ mentioned in  
the title of these laws, were no other than  
the small barons, who held *in capite* of the  
crown. Did any doubt remain, it would be  
cleared up by the 3d chapter of the statutes



of Alexander II. ; which enacted, ‘ Quod  
 ‘ de caetero, non fiat sacramentum de amiffi-  
 ‘ one vitae, vel membrorum hominis feu  
 ‘ terrae, nifi per fideles homines, et per pro-  
 ‘ bos libere tenentes per cartas.’

These statutes clearly fhew, that, in thofe days, the inhabitants of the boroughs made no part of the great council of the nation ; nor is there any reason to fuppofe that representatives from boroughs were admitted till near the end of the reign of Robert Bruce. There are extant two collections of statutes, faid to have been made in that prince’s reign, the *prima et fecunda statuta Roberti*. From the *statuta fecunda*, which, however, are not authenticated, nothing is to be learned with regard to the constitution of parliament at that time ; but, from the title prefixed to the *statuta prima*, which were enacted in a parliament held at Scone in the 13th year of Robert’s reign, we have good reason to believe, that no representation of the boroughs had as yet taken place, no mention being made of any fuch represen-  
 tatives

tatives in the enumeration of the constituent parts of that parliament \*.

We have, however, certain evidence, from an indenture drawn up in 1326, between this Robert Bruce and the earls, barons, freeholders, and communities of boroughs (as they are there termed) by which he obtained a grant, during life, of the tenth penny of all the farms and revenues belonging to the laity, that burgesſes were then admitted to parliament †. They were probably called upon that occasion, because it was in view to tax the property of burgesſes

\* They are thus deſcribed: ‘ Robertus, Dei gratia, Rex Scotorum, anno regni ſuidecimo tertio, die Dominica proxima, cum continuatione dierum poſt feſtum Sancti Andreæ Apoſtoli, ſubſequentium, reſidens apud Sconam, in plano parlamento ſuo tento ibidem, habitoque ſoleni tractatu, cum epiſcopis, abbatibus, prioribus, comitibus, baronibus, et aliis magnatibus de comunitate totius regni ibidem congregatis; ſuper variis et arduis negotiis, ipſum et regnum ſuum tangentibus, atque in futuro tangere valentibus.’

† The original indenture is in the advocates library; and a copy of it is to be found in the appendix to the Law Tracts, printed at Edinburgh in 1758.

gesſes as well as land-holders ; and they perhaps had no voice in other matters : But that they were conſidered as a ſeparate and diſtinct branch of parliament ſo early as the reign of David II. the immediate ſucceſſor of Robert Bruce, is evident from the ſtatutes of that prince ; for, in the 41ſt chapter of theſe ſtatutes, the three eſtates, or *tres communitates regni*, are particularly mentioned : ‘ In parlamento ad inſtantiam trium communitatum, per Regem expreſſe ‘ conſeſſum et publice proclamatum,’ &c. In thoſe days, there was no diſtinction in parliament between the greater and ſmaller barons ; the third eſtate muſt therefore have conſiſted of the burgeſſes, as the firſt did of the eccleſiaſtical dignitaries, and the ſecond of ‘ the comites, barones, et libere tenentes.’

It is from the period of admitting the repreſentatives of boroughs to the great council of the nation that we may date the exiſtence of parliament, properly ſo called \*.

I

\* The word *parliament* is not to be found in any of the old ſtatutes prior to thoſe of Robert Bruce ; and it appears

I shall now proceed to mention the alterations that its constitution afterwards underwent.

## SECTION II.

*Of the Alterations in the Constitution of the Scotch Parliament, from the time that the Representation of Boroughs was introduced, down to the Union of the two Kingdoms.*

**W**E have seen that the representation of counties took place, in England, at least as early as the representation of boroughs. This, however, was not the case in Scotland; and, though it may with reason be supposed, that the small barons were, before that period, become too numerous to attend in person, and that many of them were  
little

pears to have been used for the first time in Scotland in the treaty of marriage made in 1290 with Edward I. Abercrombie, vol. I. p. 460.



little able to bear the expence of such attendance; yet no attempt was made to relieve them till the seventh parliament of James I.

It does indeed appear, that personal attendance was not always deemed necessary, and that it was customary for those who were bound to serve in parliament to name procurators or deputies; but this practice was justly corrected by the act 1425, cap. 52. which enacted, ‘ That all prelates, erles, ‘ barronnes, and freeholders of the king ‘ within the realme, sen they ar halden to ‘ give presence in the kingis parliament and ‘ general councel, fra thine foorth be halden ‘ to compeir in proper person, and not be a ‘ procuratour; but gif the procuratour al- ‘ leage there, and prove a lauchfull cause ‘ of their absence.’ We accordingly learn, from the titles prefixed to the acts of the 6th, 7th, and 8th parliaments of this prince, that those who could not give a reasonable excuse for their absence were fined in L. 10. The words are: ‘ Comparentibus omnibus ‘ illis qui debuerunt, et voluerunt, et potue- ‘ runt commode interesse, absentibus qui- ‘ busdam

‘busdam aliis quorum quidem legitime excusati fuerunt; alii vero, quasi per contumaciam, se absentaverunt, quorum nomina patent in rotulis sectarum, quorum quisque adjudicabitur in amerciamento decem librarum \*.’

But, by the act 1427, cap. 101. the small barons and free tenants (the old *libere tenentes*) were relieved of the burden of attending

\* This fine was considerably increased by the acts 1587, cap. 34. and 1617, cap. 7.; and still more so by two unprinted acts of the 2d session of the 1st parliament of Charles II.; and by the first act of the 3d session of the 1st parliament of William and Mary. The act 1617, cap. 7. did however allow those prelates and peers, whose absence was lawfully excused, to give proxies to some of their own estate to vote for them; but no such privilege was by that statute given to the small barons or burgeses. This act likewise declared, that no excuse should be received but a licence from the King, if within the kingdom, or, in his absence, from his High Commissioner, and, in the absence of such Commissioner, from the Lord Chancellor and Lords of the Secret Council, to be produced the first day of the parliament. Hence Sir George M<sup>c</sup>Kenzie observes, that the allowing proxies was an advantage to the King, seeing it depended upon him whether or no they could be effectual. See his Observations, p. 344.

tending parliament, upon condition of their sending two or more wise men, as commissioners, from each shire, according to its size, except the two shires of Clackmannan and Kinross, which, being very small, were only to send each of them one commissioner. This act further directed, that out of these commissioners a wise and expert man should be chosen, who should be called the Common Speaker of parliament, and propose all things pertaining to the commons in parliament; and that the whole commissioners should have costage (*i. e.* their expences) from those of their respective shires who owed attendance in parliament \*.

It

\* By the act 1587, C. 114. It was ordered, that all freeholders should be taxed for the expence of the commissioners of the shires; that the Lords of council and session should yearly direct letters at the instance of the commissioners, for convening the freeholders to make such taxation; and that, for payment thereof, letters of horning and poinding should be directed upon a charge of six days. Still however this taxation was uncertain and undetermined; but by the act 1661, c. 35. five pounds Scots were allowed to every commissioner for each day's attendance, including the first and last days of the parliament,

It is probable that at this time James I. who had received his education in England, intended to put the parliament of Scotland upon the same footing with the English parliament, and to render the commons a separate house. But, if such was his intention, it did not take place. On the contrary, no part of this statute seems to have been much regarded. The small barons neglected to elect commissioners, and were of course still obliged to give personal attendance, that being the condition under which they were relieved of the burden.

We

parliament, and a certain number of days for going and returning, for which all the freeholders, heritors, and liferenters, except noblemen and their vassals, were to be liable in proportion to the value of their respective lands and rents within the shire. This daily allowance was however only given for the days the commissioners actually attended; and by the act 1690, c. 1. the clerks of session, as deputies of the clerk-register, were ordered to make federunts of each diet of parliament, and to mark those who were absent. By this act the clerk-register was likewise ordered to give certificates to the commissioners of shires and boroughs of their attendance, in order that they might exact their fees from the shires and boroughs which they represented.



We accordingly find a new act passed about thirty years after, by which it was enacted, “ that no freeholder under L. 20. should be constrained to come to parliament as for presence, except he were a baron, or were specially called by the King’s officer, or by writ \*.” And, in the reign of James IV. another act passed, relieving all barons and freeholders within 100 merks of new extent, unless specially written for by the king, but enjoining all those of a higher extent to come to parliament, under the pain of the old fine §.

Notwithstanding these acts, the small barons seem to have been very remiss in their attendance. Few of them went to parliament except upon particular occasions; so that at last a doubt arose, how far they were entitled to a seat †; and it was not till the

\* 1457, c. 75.

§ 1503, c. 78.

† We learn this from a letter from Thomas Randolph to Sir William Cecil, of the 10th of August 1560, in which he transmitted a copy of a petition from the lesser barons, praying

the reign of James VI. that the representation of the small barons by commissioners from the several shires, was fully established by the act 1587, c. 114.

This act proceeds upon a recital of the old statute of James I. in 1426, and regulates the manner in which the commissioners were to be elected and warned to parliament.

The act of James I. allowed every freeholder a voice in the election of commissioners; but, by the act now under consideration, only those who were possessed of a forty shilling land in free tenantry, and had their actual dwelling and residence within the shire, were permitted to vote.

The qualification of the commissioners  
C required

praying to be admitted to the parliament that was then held, and that all former acts concerning their place and estate, and in their favour, should be confirmed, approved, and ratified. The original letter is in the paper-office in the tower of London, and a copy of it is to be found in the appendix to Dr Robertson's history of Scotland, during the reigns of Queen Mary and King James VI.

required by this act, was, that they should be the king's freeholders, resident indwellers within the shire, of good rent, and well esteemed. But what the amount of their rent or estate should be, is not mentioned. It is probable that the rent which intitled a freeholder to elect, would also intitle him to be elected a commissioner.

With regard to the mode of election, the freeholders were appointed to meet at the first head court after Michaelmas yearly \*; or, failing thereof, at any other time when they

\* Of old, the sheriffs of the several counties were bound to hold three head-courts in the year, for the due administration of justice, at which all freeholders were obliged to attend; Q. Attach. cap. 33. § 3. & 5. Those who owed suit and presence were obliged to attend personally; but those who owed suit only, were allowed to send their suitors or proxies, such proxies being however qualified to pass upon an assize, 1540, cap. 71. But at present there is only one head-court held in the year, on a fixed day, at Michaelmas, or about that term. There the freeholders assemble to adjust their rolls, in the manner to be afterwards taken notice of. No freeholder, however, can now be subjected to any fine, for absence from any sheriff court, unless he be summoned to serve as a juryman, or for some other lawful purpose; 20th Geo. II. cap. 50.

they should please to assemble for that purpose, or be required to do so by his Majesty; and, after chusing their commissioners, they were to notify their names in writing to the director of the chancery. This act further ordered the commissions to be sealed and subscribed, by at least six of the barons and freeholders; and, by a subsequent act of the same prince\*, no barons were to be received as commissioners for shires in parliament, without producing sufficient commissions, granted to them in a full convention of all the barons of the shire, and authenticated (authenticated) by the subscriptions of a great number of the barons then present, and likewise by the subscription of the clerk of the meeting.

The commissioners for shires being in this manner yearly elected, the statute directed that they should be warned to any parliament or general convention to be afterwards held, by precepts issuing from the chancery, the form of summoning to parliament

C 2

that

\* 1597, cap. 276.



that was in use before the less troublesome mode of a general proclamation, took place.

It was further appointed by this act, that an equal number of the commissioners from shires should be upon the committee of articles \*, with those put upon that committee from amongst the commissioners of boroughs, and that their appearance in parliament should relieve all the remaining small barons and freeholders from giving suit and presence therein †.

However simple and plain this plan of electing commissioners from shires may appear,

\* The nature of this committee which was named at the beginning of each parliament, will be fully explained in the sequel.

† As this act did not expressly exclude the other small barons, it may be asked, Whether they might have attended in person, notwithstanding their sending commissioners to parliament? I apprehend that this question must be answered in the negative. To attend both personally and by representatives, would have been inconsistent; and, though our statutes are not always very accurately expressed, we may safely conclude, that it was the intention of the legislature to exclude them; nor do we find any instance of their ever after appearing in parliament, but by their commissioners.

pear, it would seem, that several questions arose with regard to the right of voting in these elections. To prevent such questions in time to come, it was declared by the act 1661, cap. 35. That, besides all heritors, who held a forty shilling land of the king *in capite*, all heritors, liferenters, and wadsetters, holding of the king, and whose yearly rent amounted to ten chalders of victual, or L. 1000, (all feu-duties being deducted), should be capable of electing or being elected.

To discover whether a person was truly possessed of ten chalders of victual, or L. 1000 of free rent, would often be a matter of difficulty. Of course many questions would still arise, with regard to the right of voting, and much time would be consumed in parliament, by judging of controverted elections. A new statute was therefore made about twenty years after, 1681 cap. 21. by which a variety of rules were laid down for regulating the elections of commissioners from shires.

By this act it was in the first place declared, that none should have a right to vote, but those who at the time stood publicly infest in property or superiority, and were in possession of a forty shilling land of old extent, holding of the king or prince, distinct from the feu-duties in feu-lands, or (where the old extent did not appear) stood infest in lands liable in public burden for his Majesty's supplies, for L. 400 of valued rent\*, whether such lands had formerly been church-lands, and as such then held of the king, or whether they had originally held feu, ward, or blanch of his Majesty, as king or prince of Scotland †.

This

\* Prior to this act, a new valuation was made of all the lands in Scotland, for the purpose of proportioning the land-tax. Thence arose the distinction betwixt valued rent and old extent, both of which will be explained in the sequel.

† By an act of James IV. 1489, c. 16. the free tenants of the prince were ordered to give suit and presence in parliament, until the king should have a son to answer for them therein. Hence all who held of the prince were allowed to vote in the election of commissioners for shires, a practice which takes place to this day, whether there be a prince existing at the time or not.

This act next declared, that apprisers or adjudgers should have no vote during the legal reversion; but that the heritor should continue to vote himself; and that, upon the expiration thereof, the appriser or adjudger first infeft should alone be intitled to vote, till the shares of the several adjudgers should be divided, when the extent or valuation thereof would appear.

It likewise allowed the privilege of voting to all proper wadsetters of lands, of the holding and extent, or valuation above mentioned, to apparent heirs in possession by virtue of their predecessors infeftments, to liferenters, and to husbands for the freeholds of their wives, or as having right to a liferent by the courtesy; but, at the same time, declared, that the fiar and liferenter should not both vote at the same time, upon the same lands; and that no person, who was infeft for relief or payment of money, should have a right to vote in consequence of such infeftment.

By the same statute, the freeholders of the several shires were appointed to meet at their

respective head-boroughs upon the first Tuesday of May then next, for the purpose of making up a roll, containing the names and designations of all the fiars, liferenters, or husbands having a right to vote, and expressing their respective extents or valuations; and to meet at the Michaelmas head-court yearly in time to come, in order to revise that roll, and make such alterations upon it as might occur from time to time; after which it was ordered to be inserted in the books of the sheriff or steward of the county.

This act likewise appointed the freeholders to hold their meetings for electing commissioners (whether at the Michaelmas head-court, or at the calling of parliaments or conventions) in the sheriff or steward court-room: And it further ordered, that the first or second commissioner last elected, or, in their absence, the sheriff or steward-clerk, should ask the votes of the freeholders, for the choice of a preses and clerk to the meeting; that, in case any alteration had happened in the roll since the last meeting,



meeting, the persons then coming to have right to vote should be inserted in it; and that no objection should be admitted against any person who stood upon it, which was not moved before the freeholders began to vote in the election of their commissioner.

This act also ascertained in what manner the objections made to the votes of any of the freeholders should be ultimately determined. It ordered these objections to be stated in an instrument, and to be judged of by the parliament or convention, if then called; and, in case there were no parliament or convention at the time, the meeting was enjoined to appoint a particular diet, and to intimate to the parties to attend the court of session, who were empowered to determine the objections at that diet summarily, and according to law.

It was further provided by this statute, that, if the persons objected to should appear at the parliament or convention, and instruct their right to vote, the objectors should pay their expences, and be fined in 500 merks; but if, on the other hand, the objections  
should

should be sustained, the objectors should have their expences, and the party objected to be fined in the like sum.

By this act it was likewise declared, that non-residence should be no objection; but that minority, or the neglecting to take the test, (an oath appointed by the 6th act of the same session), should be sufficient objections.

From this act, down to the time of the union, the law suffered no alteration, with regard to the election of commissioners from shires, except one, which was introduced by a statute of King William, 1698, cap. 22. declaring, That no person, during the currency of a protection from diligence, or until he renounced the benefit thereof, should be capable to chuse, or to be chosen, a member of parliament.

I have already mentioned, that the reformation, and the abolition of monasteries, occasioned a considerable alteration in the spiritual estate of the English parliament. The archbishops, however, and the bishops still remained members of the house of lords. But, in Scotland, religion at last produced a  
more

more violent effect, by entirely lopping off the ecclesiastical estate in parliament. How that alteration was brought about, it is now the proper time to explain.

The protestant church began to assume a regular form in Scotland about the year 1560. But, although the genius of the first reformers tended strongly towards that system which has since prevailed, under the name of Presbyterian, it was not thoroughly established till after many struggles. Approaching to the democratical form of civil government, it could not be favourably received by monarchs, even the most limited, far less by those who ardently wished to extend their prerogative.

Very early attacks were made, in the assemblies of the church, upon the order of bishops. In 1581, an act of assembly passed, declaring the office of bishop, as then exercised, to have no foundation nor warrant in the word of God: This, however, did not prevent a nomination being made, the very next year, to the see of Glasgow, then become vacant; and, in 1584, Mr Andrew Melvil,

Melvil, one of the ablest enemies of the hierarchy, was summoned before the privy-council, on account of his having complained loudly of the grievances of the nation, in a sermon he preached at St Andrew's, and was obliged to fly to England, in order to avoid punishment \*. Severe laws were likewise made in the same year, with a view to restrain the leaders of the church, and all those who aimed at the abolition of episcopacy. The attempting to diminish the rights and privileges of any of the three estates was declared high treason †; and the holding councils, conventions, or assemblies, to treat, consult, and determine, in any matter of state, civil or ecclesiastical, without the king's special command or permission, was forbid, under the most severe sanction §.

These laws did not, however, subdue the spirit and zeal of the presbyterian leaders. In 1586, the provincial synod of Fife summoned

\* Spottiswood, 330. † 1584, cap. 130. § 1584, cap. 131.

moned Adamson, the archbishop of St Andrew's, to appear before them, and answer for his contempt of the decrees of former general assemblies, in exercising the function of a bishop; and, notwithstanding his refusing to acknowledge the jurisdiction of the court, and his appealing to the king, a sentence of excommunication was pronounced against him. A general assembly, held soon after, entered warmly into the views of this synod; and it was with difficulty the king obtained an act, permitting the name and office of a bishop. The power of the order was greatly reduced. They were made little better than perpetual moderators of presbyteries. They were declared to be subject, like other pastors, to the jurisdiction of the general assembly; and Adamson, the archbishop, renounced all claim of supremacy over the church, and promised to demean himself suitably to the character of a bishop, as described by St Paul \*.

In

\* Dr Robertson's History of Scotland, vol. II. p. 119. Calderwood, III. 894. Spottiswood, 346.



In 1587, James VI. came of age ; and a parliament being then summoned, a law passed that threatened a deadly blow to the ecclesiastical estate : The public revenue being inconsiderable, and the administration of government becoming daily more expensive, it was necessary to provide some new fund to answer the exigencies of a prince who was naturally profuse, and a bad oeconomist. The antient patrimony of the church had suffered greatly by the depredations of the laity since the reformation ; but what still remained was very considerable, and was either held by the bishops who possessed benefices, or by laymen, in consequence of grants during pleasure. It occurred to the king and his ministers, that, from this source, a supply might be drawn, without imposing any tax upon the people ; and the temper of the nation at the time assured them that the measure would be nowise unpopular. An act therefore passed in this parliament\*, by which all  
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\* 1587, cap. 29.

the lands that then belonged to any archbishop, bishop, abbot, prior, prioress, or any prelate whatsoever, or to any abbay, convent, or cloister of friars, nuns, monks, or canons, prebendary or chaplainry, or chapters of cathedral churches, or chantry colleges, were annexed to the crown, and the king was impowered to apply the rents to his own use ; with an exception, however, of the tithes belonging to parsonages or vicarages, which were to remain with the persons serving the cure, together with the mansion-houses, and a few acres of land by way of glebe ; and also reserving to all archbishops, bishops, priors, commendators, and other possessors of great benefices of the estate of prelates who had a vote in parliament, their principal castles and mansion-houses, with the buildings and yards thereof, lying within the precincts and inclosures of their places, which were to remain with them and their successors, for their residence and habitation.

In 1592, the presbyterian government by general assemblies, synods, presbyteries,  
and

and sessions, was approved of in parliament \*; the acts that had passed against the church in 1584 were rescinded or explained; and all presentations to benefices were ordered to be directed to the particular presbyteries, for the giving of collation.

These acts did not however totally annihilate the prelates, or put an end to that branch of the three estates. They still had a right to sit in parliament; but, being deprived of their revenues, they became not a little contemptible, and were unable to bear the expence of their rank, or of attending upon the great council of the nation. This James did not relish. Besides his natural repugnance to a system that was little suited to his exalted notions of royal prerogative, he found that the influence of the crown in parliament would be greatly diminished by the abolition of the ecclesiastical estate. He therefore ardently wished to support episcopacy; but the prejudices the nation had conceived against the name and character of bishops

\* 1592, c. 116.



thority those upon whom bishoprics might be bestowed, should have in the spiritual policy and government of the church.

This act was far from giving general satisfaction to the clergy. Though calculated to reflect lustre upon their order, they were willing to sacrifice every consideration of interest and ambition, to their abhorrence of episcopacy. The general assembly was, however, at last prevailed with, after much debate and opposition, to declare, upon the 7th of March 1598, that it was lawful for ministers to accept of a seat in parliament; that it would be beneficial to the church to have its representatives in that body; and that fifty-one persons (a number nearly equal to that of the prelates who were antiently called to parliament) should be chosen from among the clergy for that purpose\*.

The manner of electing these representatives, and the authority they were to enjoy, were not determined till the beginning of the year 1600, when a general assembly was

\* Spottisw. 450. Cald. 5. 278.



was held at Montrose, in which, notwithstanding all the address the king employed to acquire a majority, he with difficulty obtained the following regulations to be agreed to: That the general assembly should recommend six persons to every vacant benefice that gave a title to a seat in parliament, out of whom the king should name one; that the person to be so named, should neither propose, nor consent to any thing in parliament that might affect the interest of the church, without special instructions for that purpose; that he should be answerable for his conduct to the general assembly, and submit to its censure, under the pain of excommunication; that he should discharge the duties of a pastor in a particular congregation, and usurp no ecclesiastical jurisdiction over his brethren; that, if the church inflicted on him a sentence of deprivation, he should thereby forfeit his seat in parliament; and that he should annually resign his commission to the general assembly, to be restored to him or not, as the assembly,

with the approbation of the king, should think most for the good of the church. \*

These regulations, however, did not take place. James succeeded in a few years to the crown of England, which added much to his authority and influence in Scotland; and, in 1606, he found himself enabled to obtain the sanction of parliament to the restitution of the order of bishops, and to a repeal of the act of annexation, so far as it related to their benefices †. Nor did he stop here; another act passed in 1609 ‡, restoring to archbishops and bishops their former jurisdiction, especially the jurisdiction of commissariots, and power of administering justice by commissaries, within their respective dioceses. Their powers were still further enlarged by an act in 1612 §; and, in 1617 ||, all the deans, and other members of the chapters of cathedrals, were restored to their manfes, glebes, rents, and other patrimony.

In

\* Spottisw. 453. 457. Cald. v. 5. 368. † 1606, c. 2.

‡ 1609, c. 6. § 1612, c. 1. || 1617, c. 1. 2.

In this manner did James bring about his scheme of restoring episcopacy. He indeed wanted to go still further, and to reduce the church of Scotland to the same form, in every respect, with the church of England. This, however, he lived not to accomplish; and his successor, Charles I. treading too precipitately in his father's footsteps, and pressing too eagerly the reception of the English liturgy, and the observance of ceremonies to which the Scottish nation was in general averse, he thereby kindled the flames of civil war, the consequences of which were fatal to his designs, and obliged him to consent to several acts of parliament, in 1640, whereby the episcopal form of church-government was entirely abolished, and all archbishops, bishops, and other prelates, were excluded from a seat in parliament, which was then declared to consist of the nobility, barons, and burgessees.

This alteration upon the constitution of parliament, by lopping off one of the three estates, was not, however, at that time, of long continuance. Episcopacy returned up-

on the restoration of the monarchy ; and, by an act of the second session of the first parliament of Charles II. \*. setting forth, in strong terms, that it was an inherent right of the crown, by virtue of the king's prerogative and supremacy in causes ecclesiastical, to order and dispose of the external government and policy of the church, the archbishops and bishops were restored to their antient place and privilege in parliament, and to the full exercise of their episcopal functions, precedence in the church, power of ordination and inflicting of censures, and all other acts of church-discipline.

The national aversion to episcopacy, however, still subsisted. It was the cause of many commotions during the reign of Charles II. and was fostered by the arbitrary proceedings of his successor, and the eager desire that superstitious prince discovered to introduce popery. No sooner, therefore, was a period put to his government, than the abhorrence of prelacy was most publicly avowed, and  
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\* 1662, cap. I.

the episcopal form of church-government declared a great and insupportable grievance. This was done in the most explicit terms by the 13th act of the meeting of the estates in 1689, which contains the claim of right, and the offer of the crown to William and Mary; and, in consequence of this declaration, an act passed, in the first parliament held under their authority, abolishing prelacy, and all superiority of any office in the church above presbyters\*. This act was soon followed by another†, restoring to their benefices those ministers, who, during the course of the two former reigns, had been deprived, or banished, for not conforming to prelacy; and, in the same session, a third act passed §, confirming the presbyterian church-government by kirk-sessions, presbyteries, provincial synods, and general assemblies, and repealing all former statutes that were prejudicial to, or inconsistent with, that plan.

Thus, at last, an end was put to the estate of the clergy in the Scotch parliament;

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and,

\* 1689, cap. 3. † 1690, cap. 2. § 1690, cap. 5.



and, from that time down to the union of the two kingdoms, the three estates were composed of the temporal peers, the barons, or commissioners from shires, and the burgesſes. Nor did any other alteration in the conſtitution of parliament take place, except that, in the ſame year 1690, the annual committee, known by the name of the Lords of the Articles (of which in the next ſection) was ſuppreſſed \*, and ſome of the larger ſhires were allowed to elect an additional number of representatives †.

### S E C T I O N III.

*Of the moſt remarkable Differences between the two Parliaments of England and Scotland.*

**H**AVING thus given a general view of the parliaments of each kingdom down to the time of the union, it will not be

\* 1690, cap. 3.    † 1690, cap. 11.

be improper to look back a little, and consider in what points they chiefly differed.

We have already seen, that, soon after the introduction of representatives from shires and boroughs, the English parliament was divided into two separate houses, the peers, and the commons; but, in Scotland, the three estates met always in one house, had one common president, to wit, the chancellor, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legislative nature.

It has, however, been questioned, whether a bill could pass into a law, or a tax could be imposed, if any one of the three estates entered a dissent. Craig seems clearly to have been of opinion that each had a negative. His words are: ‘*Sed de parliamentis hoc unum monuisse sufficiat, nihil ratum esse, nihil legis vim habere, nisi quod omnium trium ordinum consensu conjuncto constitutum est; ita tamen ut unius cujusque ordinis per se major pars consentiens pro toto ordine sufficiat. Scio hodie controverti, an duo ordines parliamenti, dissentiente*

'tiente tertio, quasi major pars, leges con-  
 'dere, onera, sive realia sive personalia, im-  
 'ponere, statuta nova introducere possint;  
 'cujus partem negantem boni omnes, et qui-  
 'cunque de hac re scripserunt, pertinacissime  
 'tuentur, alioqui duo ordines in everfionem  
 'tertii possint consentire. Quod de ever-  
 'fione dixi, idem de praejudicio et incommo-  
 'do intelligendum\*.' Sir George M'Kenzie,  
 on the other hand, embraces the opposite  
 opinion, in his observations upon the act  
 1663, cap. 24. where he expresses himself  
 as follows: 'The bishops having consented,  
 'by this act, to the imposition upon them-  
 'selves in favour of universities, it is de-  
 'clared, *That this act shall be no prepara-*  
 '*tive for laying on any burden upon the*  
 '*clergy hereafter, without their own con-*  
 '*sent.* From which it may be argued,  
 'that, though all the rest of the parliament  
 'should consent to an imposition upon the  
 'clergy, yet that could not be valid, except  
 'themselves consented to it, though the im-  
 'position

\* Craig, de Feudis, lib. 1. diég. 7. § 11.

position were carried by plurality of votes:  
But this inference is not concluding; for the  
parliament is a collective body, composed of  
the king and three estates, in which the ma-  
jor part determines the rest; and, if this  
were granted to the clergy, they being but  
a third estate, every one of the other two e-  
states might pretend the like; and so each  
estate should have a negative as well as the  
king; whereas, not only Craig has deter-  
mined that the parliament may make an act  
without the consent of any one of the states,  
having stated this question expressly; but  
we see that the boroughs having unani-  
mously dissented from the 5th act of the 3d  
session of the 2d parliament, concerning the  
privileges of the boroughs royal\*, the same  
was notwithstanding passed in parliament;  
and we all remember the memorable story  
of the boroughs rising, and leaving the re-  
bellious parliaments 1649, before the parlia-  
ment passed the act for allowing *the value*  
*of annualrents*, whereupon a worthy peer  
said,

\* The act here referred to is 1672, cap. 5.

‘ said, that, *since they had sitten so long without the head, they might well enough sit without the tail*†.’ Sir George’s opinion seems to be more consistent with the circumstance of the three estates sitting together in one house, and is confirmed by the facts he refers to; but it is surprising that he should quote Craig as an authority, when his opinion was the very reverse §.

But, even although each of the three estates had been in this respect constitutionally independent of one another, and had each enjoyed a negative; yet, by their meeting together in one assembly, the power and influence of the commons would naturally

† McKenzie’s Observations, p. 424.

§ In England, the spiritual lords form a separate estate; but, as they meet in one house along with the temporal lords, so they intermix in their votes, and the majority binds both estates; a bill, therefore, which passes the house of peers will be effectual, though every lord spiritual should vote against it. Of this several instances are given by Selden and Sir Edward Coke. In like manner, a bill may be carried through the house by the lords spiritual alone, if they constitute the majority, although every one of the temporal lords who are present should vote for rejecting it. See Blackstone, vol. I. p. 152.



rally be kept under much longer in Scotland than in England, where they early met in a separate house, and had their own speaker or president. In a country where there was little commerce or industry, and of course little wealth independent of landed property, the burgessees, and even the small barons, would feel the humbleness of their situation, and be unfit to cope with high spirited nobles, and dignified churchmen, who were possessed of great estates and large revenues. We accordingly find that, for a long time, few of the small barons gave themselves the trouble of attending, or even of sending commissioners to parliament. It was the religious disputes which took place at the reformation, and during the contest between the episcopal and presbyterian parties, and the zeal of the preachers, that first infused the spirit of liberty amongst the body of the people. But it was not till the revolution, that they met with that attention from government, which their rights and privileges, as free citizens, demanded.

The

The constitution of the Scotch parliament differed from that of the English in another material point. In the former, a committee was named, at the commencement of each parliament, out of the different estates, to prepare the business and digest the bills that were to be brought in; and it came at last to be the general practice, that no business was laid before parliament, without being previously prepared in this committee \*.

It

\* I use the words 'general practice,' because instances are to be met with, of petitions being presented to parliament, without going first through the committee of articles. Fountainhall mentions one in the parliament held in 1681: 'Lord Bargeny presented a petition in plain parliament (so that it is not absolutely necessary to go first to the articles) which was read there, and referred to the articles,' &c. See vol. I. p. 150. The same author is more full upon this point in the next page. His words are: 'At the opening of the parliament, it was *mordicus* contended by the court-faction, That nothing could be tabled in parliament till first it was brought into the articles; which seems to agree with the 218th act of the parliament 1594, and the act made in June 1663; but see a discourse, proving that this is a late innovation, destructive of the liberty and powers of the parliament; and it is thought our parliaments  
' will

It is uncertain when this select committee, which was known by the name of the Lords of the Articles, was first introduced;  
but

' will never be free of prelimitation, till that form of  
' the articles now used be rectified. They met ordinarily  
' before the parliament sat, and caused the body of the  
' parliament, their constituents, attend them an hour or  
' two, looking one to another. It is true, they waited al-  
' so for his Royal Highness the Commissioner, who never  
' appointed an afternoon's meeting, but all at ten in the  
' morning; and sometimes they sat till two, three, or four,  
' and, the day the test was voted, till six at night; and  
' then, by surprise, affairs and acts were brought in upon  
' the parliament, past in articles that morning, and very  
' seldom delayed, but put to a vote that same diet,  
' that they might not have leisure to prepare themselves  
' for arguing, nor to deliberate, combine, or take joint  
' measures; which renders many of our acts so raw and  
' undigested. See *alibi* of the Roman triduum in making  
' their acts, and of the English custom in their parlia-  
' ments, of reading their bills three several times, upon  
' several days, before it pass. But this is the prerogative  
' of the sovereign, and an advantage he hath got with  
' us over the people, his subjects. Another point, also  
' contingent with this, fell *incidenter* to be debated in the  
' parliament; but his Royal Highness shewing his dislike  
' of it, it was waved; and it was this: Whether there  
' could be two negatives, one in the parliament, and an-  
' other in the articles? Sir George Lockhart contended,  
' That

but that committees of this kind were as antient as the beginning of the reign of James I. seems to be pretty evident from the title prefixed to the acts of that prince's first parliament, as it stands in the record, and in the Saxon edition, commonly known by the name of the Black Acts, and published by authority of Queen Mary, which, after mentioning

‘ That his Majesty’s negative he had in the parliament  
 ‘ (which is not very antient with us) was sufficient to secure his supremacy, though he had it not in the articles.  
 ‘ 2do, That the articles rejecting a bill ought not to have  
 ‘ such a negative as to preclude the parliament from calling for, and considering it, if they please. But this  
 ‘ was stifled; and it seems not material, where the king  
 ‘ interposes his negative, whether in the articles or  
 ‘ parliament, whether before reasoning or voting, or  
 ‘ after them; and it seems less disobliging to do it  
 ‘ *in initio*, before the pulse be found.’ This author likewise gives us an instance of the king’s commissioner interposing a negative in the committee of articles, upon the 14th of June 1686, and that too in a private cause. ‘ At the articles, Pittarrow pressing for a  
 ‘ hearing in his affair against Lauderdale, the Earl of Murray commissioner, in favour of Maitland, interposed his  
 ‘ negative, and delayed it this session of parliament; this  
 ‘ being the first time he had used his negative: Southesk  
 ‘ took it so ill, that he protested for cost, skaith, and damage.’ Vol. I, p. 417.

mentioning the date of the holding of the parliament, proceeds as follows: ‘Convocatis tribus regni statibus ibidem congregatis, electæ fuerunt certæ personæ ad articulos datos per dominum regem determinandos, data caeteris licentia recedendi \*.’

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\* These last words, ‘data caeteris licentia recedendi,’ deserve a little attention. We may safely conclude, that, after the election of the committee, the parliament adjourned, at least until the articles referred to the *certain personae electae* were digested and drawn up in the form of acts: But it is by no means a clear point, that this particular parliament ever met again, to give the sanction of their authority to these acts; and, from the fourth act of the next parliament, in which no such committee appears to have been chosen, there is some reason to suspect, that it did not meet. This act is thus expressed: ‘Item, that it be inquyr it be the king’s ministers, gif the statutis made in his first parliament be keipit, and gif thay be brokin in ony of their punctis, that the brekaris of thame be punist efter the form and ordinance of the said parliament.’ Now, if these acts, which certainly were prepared by a committee, had been approved of in full parliament, there could be no necessity for enforcing them in this manner by the sanction of a subsequent parliament, which met so very soon after. The act here referred to has been strangely mutilated by Skeen, in his edition of the statutes.



In the title prefixed to the third parliament of the same prince, articles are said to have been put ‘ be the king to the prelatis, ‘ mychtie lordis of parliament, erlis, and ‘ barronis, to be decernit be certain persons, thairto chosen by the three estates.’ In the fourth parliament no such committee appears; but we learn, from the title of the fifth parliament, that the acts then made ‘ were tretit and determinit be our soverane ‘ Lord James, be the grace of God, King of ‘ Scottis, and certane lordis, prelatis, barronis, baronis, freehalderis, and wyse men ‘ chosen thairto, of the hail counfall of the ‘ thre estatis of the realme, in the parliament beginning at Perth,’ &c. The sixth parliament begins with certain acts made by the whole parliament, which are all in Latin. But, after these, we find inserted in the record, and in the Saxon edition, a proclamation for publishing the subsequent acts, which are declared to have been passed in a committee that seems to have been named by an intermediate parliament. From this time I have found no evidence of any committee

mittee till the eighth parliament of James II. when we meet with 'the avifement of the 'deputis of the thre eftatis, touching the 'matter of the money.' And in the title prefixed to the fourth parliament of James III. we are told, that 'power was committit 'be the hail thre eftatis, to certane personis 'under written, to commoun and conclude 'upon the matters after followand, &c. \*.' But still we do not find any of these committees stiled by the name of the Lords of the Articles, till the reign of James IV. after which they are frequently mentioned in the statute-book, and seem to have been appointed at the opening of each parliament.

What was the particular mode of electing this committee, or of what number it

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consisted

\* Those persons were not however named by that meeting of parliament, but by a former parliament, as appears from the words of the record immediately following the enumeration of the members of this committee. They run thus: 'Thir matters after followand ar 'avifit, tretit, and concludit, be the personis above writ- 'tin, in the forme as efter followis, be vertue of the power 'committit to yame, be hale thre eftatis, in the last par- 'liament haldin in Edinburgh of before.'

consisted in more ancient times, is not with certainty known ; but, from what has been now mentioned, we may presume, that they were named, not by the king, but by the estates of parliament themselves.

This might be a very harmless committee at first, and was a natural constitution enough in a country where, as is observed by an elegant historian \*, the military genius of the antient nobles, too impatient to submit to the drudgery of civil business, too impetuous to observe the forms, or to enter into the details necessary in conducting it, made them glad to lay the burden upon a small number, while they themselves had no other labour, than simply to give or refuse their sanction to the bills which were presented to them. In time, however, it came to be a great engine in the hands of the crown. Nothing being brought before parliament but through the medium of the lords of the articles, it was only necessary for the king, in order to get things managed according

\* Dr Robertson's History of Scotland, vol. I. p. 69.

according to his own wish, or to prevent any disagreeable motion from being made the subject of deliberation in parliament, to secure a majority in this preparatory committee; and that must have been a matter of little difficulty, considering the manner in which, at least in after times, it was named.

History informs us, that, as far back as 1560, the spiritual lords chose the temporal lords who were to be of this committee; that the temporal chose the spiritual; and that the burgessees chose their members themselves. This is particularly mentioned in the letter above quoted from Thomas Randolph to Sir William Cecil, of the 11th of August 1560, which likewise bears, that it was then agreed to join six of the barons to the committee; but, by whom they were chosen, the writer of this letter has not informed us. Archbishop Spottiswood concurs with Mr Randolph's account, so far as regards the noblemen having the right of electing the clergy, and tells us, that, passing by such amongst them as they knew to be

popishly affected, they made choice of the bishops of Galloway and Argyle, the prior of St Andrew's, and the abbots of Aberbrothock, Kilwinning, Lindores, Newbottle, and Culrofs; at which the prelates stormed mightily, alledging that some of them were mere laics, and all of them apostates\*.

This mode of electing the lords of the articles was no doubt favourable to the nation at this particular period, when the chief object was to get free of the tyranny and superstition of the church of Rome; but it laid open a door for extending the influence of the crown, which was made still wider in after times.

By the act 1587, c. 37. it was appointed, that an equal number of the lords of the articles, not under six, nor above ten, should be chosen out of every estate; and, by the 114th act of the same year, it was further ordered, that an equal number of the commissioners from shires should be upon this committee with the commissioners from boroughs.

\* Spottiswood, p. 149.



roughs \*. But neither of these acts tells us in what manner the members of the committee were to be chosen ; whether each estate was to chuse its own, or whether the rule that was observed in 1560 was to be followed. It is, however, pretty evident, that James VI. did not think his influence in parliament sufficiently secured by the mode of election of the committee of articles which then took place ; for, in 1594, he obtained an act†, by which, under the pretence that inconveniencies frequently arose in parliament, by a multitude of doubtful and informal articles and supplications being presented, it was ordained, that, whenever a parliament should be proclaimed, a convention should be appointed, of four out of each estate,

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state,

\* This was a natural consequence of admitting the representatives of the small barons to parliament, which was confirmed by this act, and serves to show, that, prior to this time, it was not customary for any small barons to be upon the articles, except upon such occasions as that in 1560. Indeed, they feldom attended to any number.

† 1594, cap. 222.

state, to meet twenty days before the parliament, in order to receive all articles and supplications concerning general laws, or particular parties : That these articles and supplications should be delivered to the clerk-register, who was appointed to present them to the convention for their consideration, in order that things reasonable and necessary might be formally made, and presented in a book to the lords of the articles at the meeting of parliament; and all impertinent, frivolous, and improper matters be rejected; and that no article or supplication, wanting a special title, or not subscribed by the presenter, should be read or answered in the convention, or following parliament; with power, however, to his Majesty to present such articles as he might think good, concerning himself, or the common weal of the realm, at all times. It is remarkable, that no provision was made in the act for the choice of this select body, who were to be intrusted with so extraordinary powers; and it is justly observed by an honourable author \*, that this  
 seeming

\* British Antiquities, p. 51.

seeming defect was purely an artifice, to secure the nomination of them to the king. They could not be named by parliament, because they were to meet twenty days before it was to sit; the choice, therefore, of course, would devolve upon the crown.

So barefaced an attempt to give the king a negative before debate, could not be submitted to by the nation, without parting with their privileges altogether; and we have reason to believe, that it was never put in execution, or was at least soon dropped; for, when Charles I. wanted to carry thro' his favourite scheme of bringing the church of Scotland to a conformity with the church of England, he fell upon a new device to gain an ascendant in parliament, by getting the lords of the articles named in a manner that could not fail of securing him a majority in that committee.

The bishops, at all times devoted to the crown, must have been particularly so at that period. It was therefore of little moment who should name the members of their estate who were to be on the articles.

It

It was of more consequence to the king to be assured of getting men to his mind out of the other estates. For this end, an ingenious device was contrived. The bishops, as formerly, named eight noblemen, and the noblemen eight bishops, and the sixteen so named by these two bodies being met together, made choice of eight barons, or commissioners from shires, and eight burgeses; so that, in effect, the nomination of the whole devolved upon the bishops, on whom the king could rely with confidence.

In order to secure the influence of the crown still more, the officers of state were added to this committee\*, and the lord chancellor

\* The adding the officers of state to the committee of articles, was however, no innovation; it was an old practice. When it was first introduced, does not with certainty appear: No mention is made of them in the letter from Thomas Randolph to Sir William Cecil, at the opening of the parliament 1560; nor have I found them in the records of parliament, earlier than that of the first parliament of James VI. held in 1567, where the treasurer, the secretary, the privy-seal, the clerk-register, and the advocate, are mentioned to be upon the articles. In

chancellor was appointed their president.  
A particular account of the procedure in  
chusing

1581, I find the chancellor, treasurer, secretary, comptroller, and clerk-register. In 1592, the same; only the justice-clerk in place of the lord-register. In 1607, I find the master of requests, the privy-seal, the comptroller, the collector, the justice-clerk, and the advocate; and in 1617, the high-treasurer, the treasurer-depute, the secretary, the privy-seal, the clerk-register, the justice-clerk, and the advocate. We also learn, from the records of this parliament, that it was then fixed, that these officers, (being 8 in number) and no more, should be upon the articles in time to come. The words of the record are: ‘ A question being moved to his Majesty, anent the number of officers of state who were to have place and vote in parliament and the articles; and after that the clerk-register had shewn, out of the registers of many parliaments, that they have been sometimes more and sometimes fewer than eight, his sacred Majesty, for making the number certain in all time hereafter, was graciously pleased to declare, that in this, and all parliaments hereafter, there should be no more of the said officers of state who should sit and have place, and vote in parliament and articles, but only eight set down, and their successors in their place; and, if at any time hereafter, there should be any more of the said officers of state nor eight employed in the execution of the said offices, by deputation, division, or otherwise whatsoever, yet no more should have place and vote in this and all parliaments hereafter, but eight allenarly.’



chusing the Lords of the articles, at that time, is to be found in the records of parliament 1633.

The second parliament of Charles I. which met in 1640, was not disposed to follow a precedent so adverse to its own freedom. The people had taken up arms in defence of their religion and liberties, and were unwilling to part with either, in an indirect manner. An act therefore passed \*, declaring, that all subsequent parliaments should be at liberty to chuse committees for articles, or not, as they might think expedient ; that, in the event of their chusing such committees, each estate should name its own members ; that all propositions should first be presented to the estates themselves ; that the committees for articles should only consult upon the expediency or in expediency of such articles as should be committed to them by the estates, and report their opinion ; and that, if they happened to omit making a report as to any of the articles so committed to them,

it

\* 1640, c. 3.

it should be lawful to the presenters of such articles to move them again in parliament. By another act of the same session\*, the above-mentioned act of James VI. 1594. c. 222. was expressly repealed, and all grievances and other matters to be treated in parliament afterwards, were ordered to be given in, and presented in full parliament.

These beneficial laws were, however, rescinded after the restoration. And, in 1663†, the committee of articles was again restored, and the same mode of electing them was followed, that had been observed in 1633.

It is natural to suppose, that the ardent spirit of civil and religious liberty, which brought about the revolution, and dictated to the estates of the kingdom that memorable vote, by which they declared that James VII. had forfeited the right to the crown, would not submit to a grievance of this kind. It was, indeed, the very first in order, of fifteen articles of grievances contained in the  
18th

\* 1640. c. 25.    † 1663. c. 1.

18th act of the meeting of the estates in 1689, and represented to King William, in order to be redressed in parliament. This article was thus expressed: ‘The estates of the kingdom of Scotland do represent, that the committee of parliament called the Articles, is a great grievance to the nation, and that there ought to be no committee of parliament, but such as are freely chosen by the estates to prepare motions and overtures that are first made in the house.’ It was accordingly enacted, in the first parliament of William and Mary\*, that the committee of articles should be discharged and abrogated in all time to come, and that the then, and all subsequent parliaments, should chuse and appoint committees of what number they pleased, there being always an equal number of each estate chosen; the noblemen by the estate of noblemen; the barons by the estate of barons; and the burgeses by the estate of burgeses, for preparing all motions and overtures first made in the house;

\* 1690, c. 3.

house; and might alter and change the said committees at pleasure; but with this condition, that, in all such committees, some of the officers of state appointed by the king, or his commissioner, might be present, and have power freely to propose and debate, but no power to vote.

There is another difference to be remarked between the parliaments of the two kingdoms. In England, the granting subsidies or aids to the crown, was in a manner committed solely to the commons; whereas, in Scotland, all the three estates went hand in hand in that, as well as other matters.

It is true, that, in England, every money-bill required the concurrence of the lords as well as of the commons; but then, no such bill could originate in the house of Lords; and although they might refuse to concur, they had no power to make any alterations or amendments. It may therefore, with propriety, be said, that in England the commons had the sole power of imposing taxes. This rule could not well take place in Scotland, where all the estates met in a joint body,

body, and formed only one house of parliament; nor was there the same reason for it. The upper house in England consisting of spiritual lords, who owed their benefices and seats in parliament to the king, and of temporal lords, who were a hereditary and permanent body, nowise dependent on the people, might be supposed more apt to be influenced by the crown, than the commons, who were a temporary elective body, freely named by the people. It might therefore be thought dangerous to intrust them with the power even of proposing burdens upon the subject; whereas, on the other hand, it was not to be supposed, that the commons, who were the representatives of the great body of the nation, would be so ready to grant unnecessary supplies, or lay a greater burden upon the people than the exigencies of the state required. It was sufficient that the lords had a negative, if they thought the commons too lavish or improvident in their grants \*. But, in Scotland,

\* See Blackston, vol. 1. p. 163. But how well soever  
this



land, where for a long time the great part of the landed property was in the hands of the nobles, or their vassals, and dependents, and where there was little trade or commerce to be the foundation of wealth and independence, it was late before the commons could have much influence in the affairs of government. The nobles, possessed of great estates, might safely be trusted with the power either of proposing or imposing taxes, which would be most sensibly felt by themselves †; and it was unnecessary that their authority should be less in matters of that kind, than in other affairs that came to be determined in parliament.

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this reasoning may account for the continuance of the practice of all money-bills originating in the house of commons, the introduction of it must be ascribed to another cause, viz. that, when burgesses were first sent to parliament, they had no power to offer any higher supply than they were authorised to grant by their constituents. See Chief Barons Gilbert's treatise on the court of exchequer, p. 37.

† While Scotland remained a separate kingdom, few taxes were known but the land-tax.

In Scotland, representatives were only sent from the counties and boroughs; but, in England, the universities likewise sent representatives to parliament. The first instance we discover of this was in the 28th of Edward I. when, a parliament being summoned to consider of that king's right to Scotland, writs were issued for that purpose, requiring the university of Oxford to send up four or five, and the university of Cambridge to send two or three of their most discreet and learned lawyers\*. It was not, however, till the reign of James I. of England, and VI. of Scotland, who plumed himself much upon his scholar-craft, that each of the two universities were indulged with the privilege of constantly sending two out of their body to parliament†.

It may likewise be observed, that, besides regular parliaments, the kings of Scotland were in use, upon particular emergencies, which required immediate deliberation and execution, such as a sudden invasion, or the raising

\* Prynne Parl. Writs, I. 345.

† Blackstone, vol. I. 168.

raising of a sum of money to answer a sudden exigency, to call what were termed Conventions of the estates. On such occasions, there was no necessity for any formal citation of all those who had right to sit in parliament; the king called any number that could be speedily drawn together, and their powers were limited to that particular business for which they were called. It appears, that, on some occasions, the king neglected to call any of the estate of boroughs to these conventions; and we learn from our acts of parliament, that complaints had been made on that score; for, by a statute of James IV. \* it was ordained, ‘ That the commissioners and headsmen of boroughs be warned, when taxes or contributions are given, to have their advice thereintill, as one of the three estates of the realm.’ And, by another statute of Queen Mary †, setting forth, that the queen intended rather to augment than to diminish the privileges of the inhabitants of boroughs,

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\* 1503, cap. 85.    † 1563, cap. 82.

it was enacted, 'That five or six of the  
 ' principalles, provestes, aldermen, and bail-  
 ' lies of this realme fall, in all times to  
 ' cum, be warned to all conventiones that  
 ' fall happen the queenis grace, and her suc-  
 ' cessoures, to conclude upon peace or weir,  
 ' with quhatsoever her hienes confederates  
 ' or enemies, or making or granting of ge-  
 ' neral taxationes of this realme; and that  
 ' hir hieness or council fall not conclude nor  
 ' decerne upon peace, weir; nor taxationes  
 ' foresaids, without five or sex of the saidis  
 ' principalles, provestes, aldermen, and bail-  
 ' lies of burrowis be warned thereto lauch-  
 ' fullie as effeiris.'

**TITLE**

### T I T L E III.

Of the Establishment of the Parliament of Great Britain by the Treaty of Union; and of the Representation allowed to Scotland.

**A**N union of the two kingdoms was early thought of, but did not take place till the reign of Queen Anne. In the time of James VI. of Scotland, and I. of England, the judges of England gave their opinion, that there could be no incorporating union without an entire union of the laws of both kingdoms \*. Sir Francis Bacon was, however, of a different sentiment. He maintained, that a general union of laws was unnecessary; and that no more was requisite, than that such laws as immediately concerned the good of the state should be the same in both parts of the united kingdom.

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\* Coke, IV. inst. c. 75. p. 347.



Experience has now happily confirmed the justness of his sentiments, and both nations have reason to rejoice, that the subtle reasoning of the judges in the reign of James met not with the same regard in the reign of his great grand-daughter.

By this memorable treaty it was agreed, that, upon the first of May 1707, and for ever after, the two kingdoms of England and Scotland should be united into one kingdom, by the name of *Great Britain*, and be represented by one and the same parliament, to be stiled the *Parliament of Great Britain*.

All the English lords, both spiritual and temporal, were allowed to retain their privilege of sitting in the house of peers; and the counties, universities, cities, boroughs, and cinque-ports were to send the same number of representatives to the British, that they formerly sent to the English house of commons. But the representation given to Scotland was much limited. By the twenty-second article of the treaty it was agreed, that the representatives for that part of the  
united

united kingdom should consist of sixteen peers, to sit and vote in the house of lords; and forty-five commoners, to sit and vote in the house of commons. By an act passed in the Scotch parliament \*, confirmed in the English parliament, and declared by both to be equally valid as if it had been ingrossed in the treaty of union, it was enacted, That the sixteen peers should be elected by the peers of Scotland, and their heirs or successors to their dignities and honours, out of their own number, by open election and plurality of voices: That, of the forty-five commoners, thirty should be chosen by the shires or stewartries, and fifteen by the royal boroughs: That, of the commissioners for shires, each shire or stewartry should name one, except the shires of Bute and Caithness, which were to chuse by turns, Bute having the first election; the shires of Nairn and Cromarty to chuse by turns, Nairn having the first election; and the shires of Clackmannan and Kinross likewise to chuse by turns, Clackmannan having the first election: That, of the fifteen burghs, the city

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of

\* 1707, cap. 8.

of Edinburgh should elect one ; and the other boroughs, which were divided into fourteen several districts \*, should each of them elect a commissioner, in the same manner they were in use to elect their representatives to the parliament of Scotland: That the commissioners so elected should meet at such times and places, within their respective districts, as her Majesty, her heirs and successors, should appoint, and elect one representative for each district; and that, in the event of an equality of votes, the president of the meeting should have a casting or decisive vote; the commissioner from the eldest borough presiding in the first meeting, and the commissioners from the other boroughs in each district presiding afterwards by turns, according to the order in which they were called in the rolls of the parliament of Scotland †.

It was further declared by this statute, that none should be capable to elect, or be elected,

\* The division of the boroughs into the fourteen several districts, is to be found in the Appendix, No. I.

† That order is observed in No. I. of the Appendix.

electd, to represent a Scotch shire or borough in the parliament of Great Britain, but such as were formerly capable to elect or be elected commissioners for shires or boroughs to the parliament of Scotland. It likewise made some other regulations on that head; but, as these will fall to be fully considered in the sequel, it is needless to take notice of them at present.

By this act it was also ordered, that, when her Majesty, her heirs and successors, should declare their pleasure for holding the first, or any subsequent parliament of Great Britain, and until further provision should be made by parliament in that respect, a writ should pass under the great seal of the united kingdom, directed to the privy-council of Scotland, and containing a warrant and command to them to issue out a proclamation, requiring the peers to meet at such place and time within Scotland as her Majesty, her heirs and successors, should appoint, for the election of the sixteen peers; and requiring the lord clerk-register, or two of the clerks of session, to attend such meetings, and to return the  
names

names of the sixteen peers chosen to the clerk of the privy-council, by whom they were again to be returned to the court from which the writ issued.

Similar orders were given with regard to the election of commissioners for shires and boroughs. The proclamation to be issued by the privy council was to require the freeholders to meet at the head-boroughs of their respective counties, and the boroughs to send their commissioners to such places as should be thereby appointed, for the election of their representatives; and the names of the representatives so elected for the shires and boroughs, being transmitted to the clerk of the privy-council, were likewise to be returned by him to the court from which the writ issued.

The same statute further provided, that, in the event of her Majesty's declaring, on or before the first day of May then next, 1707, that it was expedient that the Lords and commons of the then parliament of England should be the members of these respective houses of the first parliament of Great Britain,



Britain, for and on the part of England; the sixteen peers and forty-five commons, who should be chosen by the peers, barons, and burgesſes reſpectively, in the then parliament of Scotland, and out of the members thereof, ſhould be the members of the reſpective houſes of the firſt parliament of Great Britain, for and on the part of Scotland. This declaration having accordingly taken place, the firſt parliament of Great Britain met at Weſtminſter, upon the 23d of October 1707, and was compoſed as follows: The houſe of lords, of the whole body of the lords ſpiritual and temporal of England, and ſixteen peers of Scotland; and the houſe of commons, of the 513 representatives ſent to the laſt parliament of England by the ſhires, univerſities, cities, cinque ports, and boroughs; and 45 representatives of the ſhires and boroughs of Scotland, choſen from the commiſſioners for ſhires and boroughs in the laſt Scotch parliament.

By an act paſſed in the firſt ſeſſion of the firſt Britiſh parliament\*, intituled, ‘ An act  
‘ for

\* 6to Annae, c. 6.

' for rendering the union of the two kingdoms more compleat,' it was declared, that, from and after the 1st of May 1708, there should be but one privy-council for the kingdom of Great Britain. It therefore became necessary to make some new regulations with regard to the election of the representatives of Scotland. It was accordingly ordered, by the same act, that, when a parliament should be summoned, writs under the great seal of Great Britain should be directed to the several sheriffs and stewards, who, upon receipt thereof, should forthwith give notice of the time for election of the knights or commissioners of their respective shires or stewartries, and direct precepts to the royal boroughs within their several jurisdictions, reciting the contents and date of the writs, and commanding each of them to elect a commissioner, and to order such commissioner to meet at the presiding borough of the district, upon the 30th day after the test of the writ, (or the day after, if it should fall upon a Sunday), for the purpose of chusing their burgeses to serve in parliament.

liament. This act likewise directed the clerks to the meetings of the freeholders, and the common clerks of the presiding boroughs, to return the names of the persons severally elected for the shires and districts, to the sheriffs or stewards; and appointed them to annex the same to the writs, and return the whole to the court from which the writs issued.

This statute made no provision for the election of the peers. But, by an act of the same session\*, it was ordered, that, when her Majesty, her heirs or successors, should declare their pleasure for holding a parliament, a proclamation should issue under the great seal, commanding all the peers of Scotland to meet at Edinburgh, or in such other place, and at such time, as should be thereby appointed, in order to elect the sixteen peers; and that such proclamation should be duly published at the market-cross of Edinburgh, and in all the county-towns of Scotland, twenty-five days at least before the day of election.

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\* 6to Annæ, c. 23.

This is the latest statute relative to the election of the peers. Several acts have however passed since that time, with regard to the election of commissioners for shires and boroughs; and many questions have arisen in the courts of law upon the construction of these acts. Alterations have been made with respect to the qualifications of freeholders; oaths have been introduced to prevent bribery, and the rearing up of nominal and fictitious votes; remedies have been applied to abuses in the electors, and in the ministerial officers employed in matters of election. To go through these several acts of the legislature, according to the order in which they passed, or to state the decisions of the courts of law in the order they were pronounced, would not be the most proper way to give a distinct notion of the present state of the law of elections. I shall therefore follow a different method, by exhausting what I have to observe upon one subject, before I proceed to another; and, I flatter myself, that I shall thereby be able to answer, at least, in some degree, the end I have in view,

T I T L E

## T I T L E IV.

### Of the Election of the Sixteen Peers of Scotland.

**I**N this chapter I propose, first, to consider what the law requires in order to intitle a peer to vote in the election of the sixteen peers; and, next, the mode of procedure observed in such elections.

#### S E C T I O N I.

*Of the Qualifications necessary to intitle a  
Person to vote in the Election of the Six-  
teen Peers of Scotland.*

**U**PON this head, it may, in the first place, be observed, that none can vote, but such as are, properly speaking, peers of Scotland; that is, those who were so prior to the union, and the successors to their



their honours and dignities. English peers who succeed to a Scotch peerage are intitled to vote ; but no British peer can enjoy that privilege ; and, upon occasion of the Duke of Queensberry's claiming a vote, it was resolved by the house of Lords, upon the 21st of January 1708-9, ' That a peer of Scotland claiming to sit in the house of peers, ' by virtue of a patent passed under the ' great seal of Great Britain after the union, ' and who now sits in the parliament of ' Great Britain, had no right to vote in the ' election of the sixteen peers who are to represent the peers of Scotland in parliament.' The house divided upon this question : It was maintained, on the one hand, that, as the peers of England who were likewise peers of Scotland, had the right of voting in the election still reserved to them, notwithstanding their having a seat themselves in the house of Lords, there seemed to be equal reason for allowing that privilege to those peers of Scotland who had been created British peers. But to this it was answered, that a peer of England and a peer of  
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of Scotland, held their dignity under two different crowns, and by two different great seals; but, that Great Britain, including Scotland as well as England, the Scotch peerage sunk in that of Great Britain \*.

Upon the 20th of December 1711, another question was determined, of a more interesting nature. The Duke of Hamilton had been created Duke of Brandon, and a debate having arisen, how far he had a right to sit in the house of lords, in respect of that peerage, and the question being put, 'Whether Scotch peers, created peers of Great Britain since the union, have a right to sit in that house?' it carried in the negative, by five voices, 57 to 52. After this resolution, there was no longer room for the case that was decided in 1708-9, with regard to the Duke of Queensberry; but as those who have been created peers since the union, may succeed to Scotch peerages, (which is the case of the present Duke of Argyle) there

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\* See Burnet's history of his own times, 12mo edition, vol. 6. p. 3.

is reason to suppose, that they would likewise be found to be excluded from the right of voting, in the election of the sixteen peers of Scotland, were the question to be tried.

In the next place, no peer can either vote or be elected, till he be twenty-one years of age. It would indeed be absurd to allow those, whom the law, on account of their nonage, presumes to stand in need of the assistance of others in the management of their own affairs, to have a voice in matters of state.

The act 1707, c. 8. likewise excludes papists, and all those who, being suspected of popery, refuse to swear and subscribe the formula contained in the Scotch act 1700, c. 3. intituled, ‘An act for preventing the growth of popery \*.’

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\* The formula is of the following tenor: ‘I

do sincerely, from my heart, profess and declare before God, who searcheth the heart, that I do deny, disown, and abhor these tenets and doctrines of the papal Romish church, viz. the supremacy of the pope and bishop of Rome, over all pastors of the catholic church, his power and authority over kings, princes, and

The act 6to Annae, c. 23. requires, that the peers, before proceeding to election, shall take and subscribe the oaths of allegiance and abjuration. But, as these are so generally known, it is needless to insert them. I shall only observe, that, upon the death of the late pretender, some small alterations were made upon the oath of abjuration, by the act 6to Georgii III. c. 53.

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and states, and the infallibility that he pretends to, either without or with a general council, his power of dispensing and pardoning, the doctrine of transubstantiation, and the corporal presence, with the communion without the cup in the sacrament of the Lord's supper, the adoration and sacrifice professed and practised by the popish church in the mass, the invocation of angels and saints, the worshipping of images, crosses, and relicks, the doctrine of supererogation, indulgences, and purgatory, and the service and worship in an unknown tongue; all which tenets and doctrines of the said church I believe to be contrary to, and inconsistent with, the written word of God: and I do from my heart deny, disown, and disclaim the said doctrines and tenets of the church of Rome, as in the presence of God, without any equivocation, or mental reservation, but according to the known and plain meaning of the words, as to me offered and proposed. So help me God.

The same statute likewise requires them to take the oath and declaration inserted in the note below \*.

By

\* The oath is as follows, ' I A. B. do swear, that I do  
' from my heart, abhor, detest and abjure, as impious and  
' heretical, that damnable doctrine and position, that  
' princes excommunicated, or deprived by the pope, or  
' any authority of the see of Rome, may be deposed or  
' murdered by their subjects, or any other whatsoever.  
' And I do declare, that no foreign prince, prelate, state,  
' or potentate, hath or ought to have, any jurisdiction,  
' power, superiority, pre-eminence, or authority, ecclesi-  
' astical or spiritual, within this realm. So help me God.'  
And the declaration runs thus: ' I A. B. do solemnly and  
' sincerely, in the presence of God, profess, testify, and de-  
' clare, that I do believe, that, in the sacrament of the  
' Lord's supper, there is not any transubstantiation of the  
' elements of bread and wine into the body and blood of  
' Christ at, or after the consecration thereof by any per-  
' son whatsoever; and that the invocation or adoration of  
' the virgin Mary, or any other saint, and the sacrifice  
' of the mass, as they are now used in the church of  
' Rome, are superstitious and idolatrous. And I do so-  
' lemnly, in the presence of God, profess, testify, and de-  
' clare, that I do make this declaration, and every part  
' thereof, in the plain and ordinary sense of the words  
' read unto me, as they are commonly understood by  
' English protestants, without any evasion, equivocation,  
' or mental reservation whatsoever, and without any dis-  
' pensation



By the act 1900, Georgii II. c. 38, § 26. it is declared, that no peer shall be capable to elect, or be elected, who, within a year preceding the election, has been twice present at divine service, in any episcopal meeting, the pastor whereof has not taken the oaths to government, and does not pray for the king by name, and for all the royal family, in the same form as in the liturgy of the church of England. It is competent to any peer present at the election to make this objection, and to prove it either by one wit-

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ness,

‘pensation already granted me, for this purpose, by the  
‘pope, or any other authority or person, or without any  
‘hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can  
‘be acquitted, before God or man, or absolved of this declaration, or any part thereof, although the pope or any  
‘other person or persons, or power whatsoever, should  
‘dispense with, or annul the same, or declare that it was  
‘null and void from the beginning.’

This declaration which the peers are obliged to make before giving their votes, approaches so nearly to the formula, as to make one think, that the taking the one might dispense with the other. But, as the act 1707, c. 8. stands unrepealed, the formula may no doubt still be put; and if any peer refuse to swear and subscribe it, he will thereby disqualify himself from voting at that election,

ness, or by the oath of the peer objected to, which the clerk-register, or either of the clerks of session, officiating at the election, is impowered to administer; and, in case the fact be proved, or admitted, or the peer objected to refuse to depose, he is thereby disqualified from voting at that election.

The peers have a privilege in matters of election, beyond the commons. They are not only entitled to vote when present, but may, even when absent, either appoint a proxy to vote for them, or send a signed list to the meeting. This privilege is, however, laid under certain regulations.

In the first place, the person appointed proxy must be himself a peer, qualified according to law; and the mandate must be duly signed before witnesses. Such are the words of the act 1707, c. 8.; and, on the 26th January 1708-9, the house of lords resolved, that such mandates were not valid, without the subscription of the witnesses. It was, however, found, upon the 29th of the same month, that there was no necessity for mentioning the names of the witnesses, or  
of

of the writer of the mandate, nor for its being sealed or written upon stamped parchment. With regard to the lists which absent peers are allowed to send to the meeting, the statute only requires, that they be signed; but the house of lords likewise resolved, upon the same 29th of January, 1708-9, that such lists were not valid without subscribing witnesses, but were good without mentioning the name of the writer.

In the *next* place, such as are peers both of England and Scotland must sign their mandates or lists by the title of their Scotch peerage; and no peer can hold more than two proxies at one time\*.

*Lastly*, The absent peers who appoint proxies, or send signed lists to the meeting, must take and subscribe the oaths and declaration appointed to be taken by those who are present at the election. Those who are in Scotland at the time of the proclamation for the election, may do so in any sheriff-court, and the sheriff, or his deputy, before

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whom

\* 6to Annae, cap. 23. § 5. 6.

whom they are taken, must return the original subscription of such oaths and declaration to the meeting, together with a certificate under his own hand and seal, that they were taken and subscribed in his presence †. Those again who, at the time of the proclamation, reside in England, are allowed to take and subscribe them in the high court of chancery, court of king's bench, court of common pleas, or court of exchequer, to be certified by writ under the seal of such courts. And as some peers, who had formerly qualified themselves, might be absent from the kingdom, in the service of her Majesty, at the time of issuing a proclamation for election; and as it was thought hard to deprive them of their votes, merely because they had it not in their power to qualify anew, the statute allowed them to appoint

† It was accordingly declared by the house of lords, 26th January 1708-9, that the sheriff's certificate ought to be sealed, as well as signed. The words of the statute are indeed express, and the doubt could only arise from its not being customary to adhibit seals to writings in Scotland,

appoint proxies, or to send signed lists, upon its being certified, in the manner above mentioned, that they had formerly taken the oaths and declaration, or upon its being certified, under the great seal of Great Britain, in the event of their having taken them in parliament\*.

The high and the low, the rich and the poor, are equally subject to the calamities incident to humanity. It may therefore be asked, Whether a peer, who has the misfortune to become fatuous, can vote in an election? The law has said nothing on that head. I incline to think, that, if he is declared to be in that unhappy state by an act of the law, and put under the power of a tutor or guardian, he cannot vote; but that, until that be done, his vote will be sustained.

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\* 6th Annae, cap. 23. § 4.

Forms of a proxy, and of a signed list, and of a sheriff's certificate, are to be found in the Appendix, No. 2, 3. and 4.



## S E C T I O N II.

### *Of the Manner of electing the Sixteen Peers of Scotland.*

**W**E have already seen, that, when a parliament is to be held, the peers of Scotland are called by proclamation to meet for the purpose of electing their representatives, and that such proclamation must be published at Edinburgh, and the other county-towns of Scotland, at least twenty-five days before the time appointed for the election.

The same statute \* orders the peers to come to such meetings with their ordinary attendants only, under the several penalties inflicted by the laws and statutes of  
of

\* 6to Annae, cap. 23. § 4.

of Scotland, prescribing and directing with what numbers and attendants the subjects of that part of the kingdom might repair to the public courts of justice\*.

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\* By the act, 1457, cap. 82. confirmed by 1487, cap. 104. it was ordained, That all the lieges should come to the king's courts, spiritual or temporal, in a sober and quiet manner, and bring with them no more persons than are in their daily household and family. By the act 1555, cap. 41. persons called before a justice-court were only allowed to have six of their friends with them at the bar, besides their advocates, to defend them, and the judges were ordered to charge the breakers of that act to enter their persons in ward, to remain there during the queen's pleasure, under the pain of rebellion; and, in case of their refusal, to put them to the horn. These acts were ratified by 1584, cap. 140. with this addition, that those who repaired to the criminal courts, otherwise than they were allowed by such acts, should incur the crime of convocation of the king's lieges. An unlawful convocation, is a commotion of the people raised without lawful authority. The convocating the lieges in bands of men of war, for daily or monthly wages, without special licence, was made capital, by the acts 1563, cap. 75. and 1585, cap. 12. But naked assistance at such meetings was found, in 1665, only to infer an arbitrary punishment; and Sir George M'Kenzie informs us, that the crime of simple convocation, without bands or leagues, was ordinarily prosecuted before the privy-council, and was seldom punished *tanquam crimen per se*, but only as an aggravation of a riot or other crime.

This act likewise declares, that it should not be lawful for the peers so met together, to act, propose, debate, or treat of any matter or thing whatsoever, except the election of their representatives; and that any person who should at such meeting presume to act, propose, debate, or treat of any other matter, should incur the penalty of premunire, as expressed in the statute of the 16th of King Richard II. \*

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\* This statute, 16to Rich. II. c. 5. was made to prevent the purchasing bulls from Rome, and to declare the independency of the crown of England; and it was thereby particularly enacted, ‘ That, if any purchase or pursue, or  
 ‘ cause to be purchased or pursued, in the court of Rome, or  
 ‘ elsewhere, by any such translations, processes, and sentences  
 ‘ of excommunications, bulls, instruments, or any other  
 ‘ things whatsoever which touch the king, against him,  
 ‘ his crown, and his regality, or his realm, as is aforesaid;  
 ‘ and they which bring within the realm, or them receive,  
 ‘ or make thereof notification, or any other execution  
 ‘ whatsoever, within the same realm or without, that they,  
 ‘ their notaries, procurators, maintainers, abettors, fau-  
 ‘ tors, and counsellors, shall be put out of the king’s pro-  
 ‘ tection, and their lands and tenements, goods and chat-  
 ‘ tels, forfeit to our lord the king; and that they be at-  
 ‘ tached

The day named for the election being come, the peers assemble at the place fixed by the proclamation, and are attended by the lord clerk-register, or two of the principal clerks of session, specially appointed by him. After prayers by one of the king's chaplains, who attends for that purpose, the proclamation and the execution at the market-cross of Edinburgh are read. The roll is then called, the peers present are marked in the minutes, and the certificates of the absent peers having qualified themselves for granting proxies or sending signed lists, being produced, these lists or proxies are likewise regularly marked. This being done, the oaths are administered to the peers who are present; after which, the votes are carefully collected and examined, and a certificate of the names

tached by their bodies, if they may be found, and brought before the king and his council, there to answer to the cases aforesaid; or that process be made against them by *praemunire facias*, in manner as it is ordained in other statutes of provisors, and other which do sue in any other court, in derogation of the regality of our lord the king.

names of the sixteen peers who have the majority of voices in their favour, is made up, and signed and sealed in presence of the meeting, by the lord clerk-regifter, or the clerks of session appointed to officiate for him, and returned to the court of chancery before the time fixed for the meeting of the parliament \*.

But, in this certificate, no notice is taken of any objections that may have been made in the meeting to any of the peers : Those, however, who desire it, are entitled to get a copy of such objections, or an extract of the minutes from the clerks, and may dispute the election of the peer so objected to, by preferring a petition to the house of lords, complaining of the return †.

Hitherto, I have only spoken of a general election upon the calling of a new parliament. The same rules are however observed, when a vacancy happens by the death or legal disability of any of the sixteen, during

\* 1707. c. 8. 6to Annae, c. 23.

† A copy of this certificate is to be found in the appendix, No. 5.



ring the course of a parliament. All the peers are summoned by proclamation to meet and elect a new representative to supply the vacancy; and the same form of procedure takes place at that meeting as at a general election \*.

All elections ought to be free; and, to prevent even the appearance of restraint, it is ordered by the statute 8vo Geo. II. c. 30. that all soldiers, who are quartered in any city, borough, town, or place, where an election either of peer or commoner is to be made, shall be removed to the distance of two miles, one day at least before the day appointed for the election, and shall not make any nearer approach till the day after it is ended. Orders to this purpose must be given by the secretary at war, or other person who officiates in his place; and, if he neglect to send such orders, and be convicted thereof within six months, he is to be discharged from his office, and is thereby disabled to hold any office or employment in his Majesty's

\* 6to Annae, c. 23. § 11.

ty's service. This act does not, however, extend to the city of Westminster, or borough of Southwark, in respect of his Majesty's guards, nor to any place where the king or any of the royal family reside at the time, in respect of such troops as attend as guards; nor to any castle or fortified place where any garrison is usually kept, in respect of such garrison. And the act further declares, that the secretary at war shall not incur the forfeiture on account of his not sending orders for the removal of the troops at an election to fill up a vacancy, unless notice of the making out the new writ be given him by the clerk of the crown, which notice that officer is required to give with all convenient speed.

T I T L E

## T I T L E V.

Of the Election of the Commissioners from the Shires of Scotland.

**I**N this title, various subjects will occur. It will therefore be proper to divide it into several sections.

### S E C T I O N I.

*Of the Freeholders Roll.*

**I**T has been already mentioned, that by the act of Charles II. 1681, c. 21. the freeholders of each county were ordered to make up a roll of their number, containing the names of those who had a right to vote, and expressing their respective extents or valuations; and that they were also appointed to

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meet yearly at the Michaelmas head-court, for the purpose of revising that roll, and making the necessary alterations upon it. From that period, no person could legally vote in the election of a commissioner to parliament, without being put upon the roll. Before, therefore, I proceed to consider either the qualifications required by the law to entitle one to elect, or to be elected a commissioner from a shire, or the mode of procedure that is observed in such elections, it will be proper to state the manner in which that roll is kept, and to mention the rules which the legislature has laid down, in order to guard against the partiality of freeholders in that respect.

The act of the 16th of George II. cap. 11. intituled, ‘ An act to explain and amend the  
 ‘ laws touching the elections of members to  
 ‘ serve for the commons in parliament, for  
 ‘ that part of Great Britain called Scotland,  
 ‘ and to restrain the partiality, and regulate  
 ‘ the conduct of returning officers at such  
 ‘ elections,’ is now the governing rule with  
 regard to the manner of keeping the roll,  
 and

and the form of procedure at the annual Michaelmas head-courts.

It would appear from that statute, that, in some counties, the rolls had not been regularly kept, pursuant to the directions of the act 1681. It was therefore enacted, That such persons as stood upon the roll last made up by the freeholders, whether at the Michaelmas meeting, or at the last election of a member to serve in parliament, should be the original constituent members at the next Michaelmas meeting, or meeting for election. And, as it was supposed that many persons then stood upon the rolls who had no legal qualification, the statute further provided, that it should be lawful to any freeholder standing upon the roll to object to the title of any other person standing upon it, by applying to the court of session, in the form of a summary complaint, at any time before the first of December 1743; and, upon the presenting of any such complaint, the court of session was directed to grant warrant for summoning the persons complained of to answer upon thirty days



notice, after which they were ordered to determine the question in a summary way; but it was at the same time declared, that, if no complaint should be exhibited within that period, no freeholder standing upon the roll last made up should be struck off, or left out of it, except upon sufficient objections, arising from an alteration of that right or title in respect of which he was inrolled.

The sheriffs having been irregular as to the time of holding their Michaelmas head-courts, it was by this statute directed, that every sheriff should, at least fourteen days before Michaelmas then next, appoint a precise day for holding such court in the year 1743, and cause the same to be intimated at all the parish-churches within the shire, upon a Sunday, at least eight days preceeding; and that the day so to be fixed should be the anniversary for holding the Michaelmas head-court in all time to come.

By this act it was further declared, that it should be competent to any person who was refused to be admitted, or who was struck off the roll by a judgment of the freeholders,

holders, at any Michaelmas meeting, or meeting for election, to apply within four calendar months to the court of session by summary complaint; and that the court, after granting warrant for summoning the person on whose objections the complain-er was refused to be admitted, or struck off the roll, to answer upon thirty days notice, should proceed and determine upon such complaint in a summary way.

A delay to inroll has been held equivalent to a refusal. At the Michaelmas meeting of the county of Cromarty, in October 1755, three claims for enrolment were offered, upon each of which the freeholders gave the following deliverance: ‘ The meet-  
‘ ing, in respect that a process of reduction  
‘ is now in dependence, at the instance  
‘ of Sir John Gordon of Invergordon  
‘ Baronet, before the court of session, of  
‘ the decret of division of the commis-  
‘ sioners of supply of the shire of Cromarty,  
‘ dated in May last, whereby alone the va-  
‘ luation of the lands and others contained  
‘ in the foresaid claim, is ascertained, do

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‘ therefore

' therefore supersede, for the present, coming  
 ' to any determination upon the validity or  
 ' invalidity of the claimants titles to be en-  
 ' rolled, not thinking that matter yet ripe  
 ' for their judgment, for either sustaining or  
 ' refusing his enrolment, till after the issue  
 ' of the said process of reduction; reserving,  
 ' till then, to all parties concerned, all ob-  
 ' jections and answers in relation to the  
 ' claimants title.' The claimants preferred  
 complaints to the court of session upon the  
 statute, and prayed the court to grant war-  
 rant for their being added to the roll. The  
 freeholders objected, That the case did not  
 fall within the words of the statute, in re-  
 gard they had not refused to enrol, but had  
 only delayed to give judgement, until they  
 should have an opportunity of knowing  
 whether the claimants were truly possessed  
 of the valuation required by law; and that,  
 at any rate, the court of session, being only  
 a court of review, without any original ju-  
 risdiction in matters of that sort, could not  
 order an enrolment *prima instantia*, as prayed  
 for in the complaints, but could only order  
 the

the freeholders to proceed to judge of the merits of the claims at their next annual meeting. The court repelled these objections, and ordered the claimants to be added to the roll; and afterwards refused a petition from the freeholders, offering to go into the merits of their objections to the claimants titles \*.

A case somewhat similar occurred very lately. Colonel Campbell of Barbreck lodged a claim for being inrolled as a freeholder of the county of Bute at Michaelmas 1772. At that meeting only two freeholders attended; and though they knew that such a claim was lodged, and in the hands of the sheriff-clerk, they took no notice of it, because no person appeared in the behalf of the claimant, and proceeded to make up their minutes, as if no such claim had existed. But, while the preses was signing these minutes, the claimant's brother-in-law, who was himself a freeholder, came to the meet-

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ing,

\* 15th January 1766, Rose of Aitnoch and others, *contra* Sir John Gordon and Leonard Urquhart. The house of lords affirmed both judgments March 1766.

ing, and insisted that they should take the claim under their consideration. This, however, they refused, upon the pretence that their business was over, and the meeting dissolved. Colonel Campbell preferred a complaint, and the court pronounced the ordinary interlocutor, finding that the freeholders did wrong in refusing to enrol him, and ordering him to be added to the roll. To show their disapprobation of the conduct of the freeholders, the court likewise condemned them in costs of suit \*.

This statute likewise provides, that any freeholder standing upon the roll, who apprehends that another has been wrongfully inrolled, may in like manner complain to the court of session, within four calendar months after such inrolment, whether he was present at the meeting where the inrolment was made or not. But, if no complaint be made within that period, the person so enrolled must continue upon the roll until

\* June 1773, Colonel Campbell of Barbseck, *contra* M<sup>c</sup>Niel of Kilmory and M<sup>c</sup>Conochie of Ambirbeg.



until an alteration of his circumstances shall happen, which the freeholders, at a subsequent Michaelmas meeting, or meeting for election, shall allow to be a sufficient cause for striking him off.

If, in any of these cases, the court of session reverse the determination of the freeholders, by ordering a person to be added to, or struck out of the roll, the sheriff, or steward-clerk, upon production of an extract of the judgement, must forthwith make the alteration thereby directed, under the penalty of L. 100 Sterling, to be recovered by the person in whose favour such judgement was given, or his executors, by a summary complaint before the court of session, upon thirty days notice.

This statute, taking it in a strict and literal sense, has provided no remedy, in the event of the freeholders unjustly repelling an objection for striking a person off the roll. Hence it has been made a question, whether a complaint to the court of session be competent in a case of that kind? Two such complaints came from the county of Kinross  
in

in 1766 \*; but in these the incompetency was not pleaded. It was however afterwards pleaded, in the case of Mr Pulteney, whom the freeholders of the county of Cromarty had refused to strike off the roll. There the question was fully considered, and the complaint was found competent, although not falling under any of the three cases to which the words of the statute apply †. A similar judgement was, afterwards given, in the case of Sir George Suttie.

The words of the statute allow only those to complain of an enrollment, who stand themselves upon the roll. Complaints have, however, been received by the court of session, from persons who did not stand upon it at the time of their being preferred. One instance shall be given. Mr Gordon of Newhall claimed to be enrolled as a freeholder of the county of Cromarty, at Michaelmas

\* 1767, Ranken of Colden, and General Irvine of Burleigh, contra Ramsay of Kinkell, and Colvill of Ochiltree.

† 11th February, 1768, Sir John Gordon, contra William Pulteney.

chaelmas 1766; but his claim was rejected, upon which he complained to the court of session. Mr William Johnston was enrolled by the same meeting, and Mr Gordon complained of his enrollment. Mr Johnston put in an answer to this last complaint, in which, without going into the merits of his own title, he objected to the competency of the complaint, in regard that Mr Gordon did not then stand upon the roll. The court, before determining that objection, ordered an answer upon the merits to be given in. This being done, they proceeded, first, to determine, whether Mr Gordon should have been enrolled; and having ordered him to be added to the roll, they then gave judgment, in Mr Johnston's case, in the following words: ' The Lords having advised this  
' petition and complaint, with the answers  
' thereto, now and formerly given in for  
' Mr William Johnston the respondent, they  
' repell the preliminary objection to the  
' complaint, that there is no person upon  
' the roll of freeholders intitled to com-  
' plain, in respect, by interlocutor of this  
' date,

‘ date, the title of William Gordon of New-  
 ‘ hall to be upon the roll is sustained,  
 ‘ &c.\*’

The statute likewise enacts, that, if the judgement of the freeholders refusing to admit, or striking off the roll, be affirmed by the court of session, the person who preferred the complaint shall forfeit to the objector L. 30 Sterling, together with full costs of suit. This was intended to prevent groundless complaints; but is evidently defective, as it imposes no penalty nor costs of suit upon the freeholder, who, without just grounds complains of an enrollment made by the other freeholders, nor gives any penalty or costs to those, who have been wrongfully refused to be admitted, or have been improperly struck off the roll. The court of session may indeed give costs of suit, if they think proper; but they are not bound to do so; nor can they impose the penalty, but in the precise terms of the statute, which, in this respect, falls short of the act 1681.

And,

\* 17th February 1767, Gordon of Newhall *contra* Johnston.

And, although it may be thought, that it would be improper to lay penalties or costs upon the freeholders, when their judgments, refusing to admit, or striking off the roll, are reversed, as in such cases it may be supposed, that they have only been guilty of an error; yet surely there could be no impropriety in subjecting to such costs and penalty the freeholder who brings a groundless complaint against a judgement of his brethren, admitting one to the roll, or refusing to strike off one, to whom he had made frivolous objections. Where a complaint brought in the joint names of a life-renter and fiar of the same lands is dismissed, the court imposes only one penalty of L. 30 upon both \*.

It has already been observed, that, by the act 1681, c. 21. no objection could be moved in parliament in the case of a controverted election, which had not been stated at the meeting of the freeholders. From this statute, and from the court of session's being only

\* 1768, *Frazer, &c. contra Ross of Priesthill*, and Gordon of Carroll.



only a court of review, and having no original jurisdiction in matters of enrollment, it was maintained, that in a complaint preferred under the authority of the act of the 16th of George II. no new objections could be made to a claimant's title, in order to support a judgment of the freeholders refusing to enroll him. But the court over-ruled that plea, and found it competent to the respondent to the complaint, to insist in every objection that lay against the claim, whether mentioned at the meeting of the freeholders or not \*. Objections may escape the freeholders at their meeting; and it would be hard to put any restraint upon their justifying their refusal, or to bar them from maintaining an insuperable objection to a complainer's title, merely because they had not thought of stating that particular objection at the time when the claim was presented. It is just to allow them to bring in every circumstance tending to shew that their judgement was agreeable to law; and it would

\* 28th July 1761, Mr Walter Stewart and others, *contra* Mr David Dalrymple. Affirmed in the house of Lords, 1st April 1762.

would be absurd to suppose, that a court of review could legally order a person to be added to the roll, when the freeholders, who refused to admit him, were able to shew, that he had no manner of title to get upon it.

It is a different question, whether new evidence can be received before the court of session, in order to support a claim for enrolment which has been refused by the freeholders? Those who claim to be enrolled ought certainly to instruct their qualification in a proper manner: If they neglect to do so, they have themselves alone to blame; and, the court of session, being only a court of review, can have no right to order an enrolment upon titles that were not laid before those who are by law intrusted with the power of judging in the first instance. So it has been decided. Sir John Gordon claimed to be enrolled as a freeholder of the county of Cromarty at the Michaelmas meeting 1766; but neglected to produce a retour to shew the old extent of the lands on which he claimed. The freeholders having refused to enroll him, he complained to the court of session,

session, and produced a retour, shewing that they were of the full extent required by law; but the court dismissed his complaint, because the retour had not been produced to the freeholders\*. Another case occurred soon after: Captain Stewart claimed to be enrolled as a freeholder of the county of Forfar, upon the lands of Nevay, lying within the parish of Nevay; and, in proof of his valuation, produced a certificate under the hands of the collector, and two commissioners of supply, bearing, that the lands which belonged to the laird

\* 17th February 1767, Sir John Gordon *contra* Frazer, &c. This decree was affirmed in the house of lords, 4th May 1767; and in the judgement it was particularly declared, ' That the titles produced by the complainer to the freeholders, upon which he claimed to be enrolled, were essentially defective, for want of shewing a retour; for which reason, the freeholders did right in refusing to enroll him; and that, upon his petition complaining of such refusal, the court of session was confined to the titles laid before the freeholders, having no jurisdiction, by the statute in that case made and provided, to order a claimant to be enrolled upon any title originally produced to them, and not laid before the freeholders in the first instance.'

laird of Nevay, in the parish of Nevay, were stated in the valuation-roll of the county at L. 800, and paid cels and public burdens accordingly. To this claim it was objected, that no sufficient evidence had been produced, to show that the lands rated at L. 800 in the valuation-roll, as belonging to the laird of Nevay, in the parish of Nevay, were the same with the lands of Nevay belonging to the claimant. The freeholders sustained the objection, and refused to enroll. The claimant complained to the court of session; and, although he produced a compleat progress of the lands from 1631 downwards, from which it clearly appeared, that his lands were the very same with those that stood rated in the valuation-roll at L. 800, the court dismissed the complaint\*.

It has however been maintained, in a case still depending, that altho' a claimant who neglects to produce any part of his title to the meeting of freeholders, cannot be allowed to supply that defect under a complaint to the court of session; yet it is competent to produce new  
I collateral

\* 19th December 1767,

collateral or explanatory evidence to support a title, and to remove objections that have been made to it in the meeting of freeholders. The case here referred to is that of Mr Gordon of Whiteley. That gentleman claimed to be enrolled as a freeholder of the county of Banff at Michaelmas 1772, upon certain lands, and, amongst others, ‘ the lands  
‘ of Inveraurie, and the lands of Inverhebit,  
‘ formerly called Middle or Little Inverhe-  
‘ bit, and now called Bellchorach of Inver-  
‘ hebit.’ To prove the valued rent of these particular lands, he referred to a valuation-roll made up in 1690, which contains the following article: ‘ Inveraurie and Inverhe-  
‘ bit, L. 250.’ To this claim it was objected, that there were three different farms of the name of Inverhebit, to wit, Easter, West-er, and Middle or Little Inverhebit; and that no evidence was produced to shew, that the valuation stated in the roll 1690, to Inveraurie and Inverhebit, applied only to Little Inverhebit. The freeholders sustained the objection, and refused to enroll. Mr Gordon complained of this judgment, and  
offered



offered to prove, ' that the lands of Little In-  
' verhebit, now called Bellchorach, were the  
' lands which, together with Inveraurie, had  
' uniformly paid cefs for the article of L. 250,  
' in the valuation-book.' The respondents  
to the complaint objected to the competency  
of this proof; but the court thought proper  
to allow it before answer\*. A petition has  
however been preferred, but has not hitherto  
been advised.

When a complaint is to be preferred a-  
gainst an enrolment, or against a refusal up-  
on the part of the freeholders to sustain an

I. 2

objection

\* 11th March 1773, General Abercromby and others,  
*contra* Gordon of Whiteley. This case seems to be pretty  
similar to that of Captain Stewart.

In the above-mentioned case of Mr Pulteney, where he  
objected to the competency of the complaint brought by  
Sir John Gordon and others, on account of the freehold-  
ers refusal to strike him off the roll, it was likewise plead-  
ed, that it was not competent to the complainers to resort  
to evidence in support of their objections, which had not  
been laid before the freeholders when these objections  
were under their consideration. But, as the new evidence  
offered in that case by the complainers was Mr Pulteney's  
own oath, which could not be got at the meeting, as he  
was not present at it, the plea was over-ruled.

objection for striking one off the roll, it is sufficient to make the person who has been enrolled, or has been allowed to continue upon the roll, a party to such complaint. In like manner, when one who has been refused to be admitted to the roll, or has been struck off, intends to complain, it is sufficient to call the person or persons who objected to his title in the meeting of freeholders. If the minutes are silent on that head, he must call all those who voted to sustain the objection; if that do not appear from the minutes, he must call all the freeholders who were present at the meeting; and a misnomer of any one of the persons complained of will be fatal to the complaint\*.

When a complaint is moved in court, a warrant is granted for serving it upon the persons complained of. If they are within Scotland, the service must be made personally, or at their dwelling-houses. If they are absent from the kingdom, it is sufficient that  
it

\* See 13th February 1745, Dickson *contra* Gibson, and a case to be taken notice of in the sequel.—Jan. 1766, Alexander Young, *contra* Andrew Johnston and others.

it be made at the market-crofs of Edinburgh, and pier and shore of Leith. The warrant for service may be extracted immediately, without abiding the course of the minute-book; but the court has found, that an extract is not absolutely necessary\*. Neither is it necessary that the service be made by a messenger at arms; any person may do it, nothing more being requisite, than that the complaint be properly notified to the person complained of, and that evidence of such notification be produced to the court.

If the freeholders, after a complaint is served, take it upon them to proceed further against the complainer, they become guilty of a contempt of the court, and may be punished accordingly †.

It has been already mentioned, that those who stand upon the roll last made up, are the original constituent members of the an-

I 3 nual

\* 5th July 1747, Burgeses of Rutherglen *contra* the magistrates. 28th July 1761, Mr Walter Stewart *contra* Mr David Dalrymple. It is, however, more safe and regular to extract the warrant.

† 6th February 1745, Monro *contra* M'Kenzie.

nual meeting of the freeholders at the Michaelmas head-court; and, in order to prevent abuses, the statute requires, that an extract of the roll made up at each meeting, and of the minutes of the proceedings, shall forthwith be delivered by the clerk of the meeting to the sheriff-clerk\*, *gratis*, to be inserted by him in the sheriff's books kept for that purpose, which must be produced at the next meeting.

If the sheriff-clerk neglect or refuse to insert the rolls or minutes of proceedings in the books to be kept for that purpose, or neglect or refuse to give signed copies or extracts thereof, to any freeholder who demands them, and is willing to pay the legal fee for an ordinary extract of the same length, or omit to produce the books at any subsequent meeting, he forfeits the sum of L. 100 Sterling, to be recovered by any freeholder within the county who will sue for it.

And,

\* The statutes relative to elections talk always of the sheriff or steward, and of the sheriff or steward-clerk; but, as these officers differ only in name, I shall for the future mention only the sheriff and sheriff-clerk.

And, in order that no prejudice may arise through the fault of the sheriff-clerk, the statute further provides, that in case the principal books, containing the rolls and the minutes, shall not be produced at any Michaelmas meeting, or meeting for election, a copy of the roll and minutes, extracted and signed by the sheriff-clerk, shall be sufficient to supply their place. Another penalty of L. 100 Sterling is likewise imposed upon the sheriff-clerk, if he give out false copies of the roll or minutes, extracted and signed by him; and he also thereby becomes incapable, for ever after, of holding or enjoying his office.

The principal books, or, failing them, an extract of the roll last made up, being produced, the first thing to be done is to chuse a preses and clerk to the meeting; for which purpose the roll is called, and the votes asked by the commissioner last elected, i. e. the person who last represented the county in parliament, or, in his absence, by the sheriff-clerk. If, in the choice of preses or clerk, there happen an equality of votes,



the commissioner last elected, and, in his absence, the freeholder present who last represented the shire in any former parliament, is entitled to the casting or decisive vote. If no such person be present, this casting vote is the privilege of the freeholder who last presided at any meeting for election; and, in his absence, it belongs to the freeholder who last presided at a Michaelmas meeting; and if no person be present who has either represented the county in parliament, or formerly presided at a Michaelmas meeting, or meeting for election, it is allowed to the freeholder who stands first upon the roll among them that appear at the meeting \*.

The preses and clerk being thus chosen, the minutes of their election are signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, and delivered to the clerk of the meeting; after which the freeholders proceed to take and subscribe the oaths of allegiance and abjuration, and to sign

\* This part of the statute, if strictly interpreted, applies only to meetings for election; but the same rule is observed in Michaelmas meetings.

sign the assurance †. It is not, however, absolutely necessary to take the oath of abjuration, unless it be expressly required to be put by one of the freeholders present at the meeting. Quakers are not obliged to swear these oaths. It is sufficient that they declare the effect of them upon their solemn affirmation §.

The clerk chosen to the meeting likewise qualifies, by taking the oaths now mentioned; after which the freeholders apply themselves, in the first place, to purge the roll, by striking out the names of those who may have died since the former meeting. They then consider the objections made to those who stand upon the roll, if any such have been lodged; and next take up the claims that are presented for enrolment; and, judgment being pronounced upon these claims, according to the votes of the

† Although it is customary to chuse the preses and clerk before taking the oaths to government, these oaths must be previously taken, if required to be put by any freeholder present at the meeting; 7mo Geo. II. cap. 16 § 10.

§ 7mo Wil. III. cap. 34. 6to Ann. cap. 23.

the majority, a new roll is made up, and an extract thereof given to the sheriff-clerk, as already mentioned, the preses of the meeting having the casting vote in every question where there is an equality.

This is the rule of procedure at the Michaelmas meetings; and, so far as regards the revising of the roll, and making the necessary alterations upon it, the same rules are followed at meetings for election.

To prevent surprise, and to give the freeholders an opportunity of fully considering the business that is to come before them, it is by the same statute appointed, That every person who has it in view to be enrolled at a Michaelmas meeting, shall, at least two calendar months before that meeting, leave with the sheriff-clerk a copy of his claim, setting forth the names of his lands, and the nature and dates of his titles, together with the old extent or valuation on which he desires to be enrolled; and, if he neglect to do so, he cannot be enrolled at that meeting. In like manner, those who intend to object to any freeholder who stands upon the roll,  
on

on account of an alteration in his circumstances, must, two calendar months before the meeting, leave their objections in writing with the sheriff-clerk, who, by the statute, is required to indorse upon the back of the claims, or objections so left with him, the day of his receiving them, and to give copies to any person who demands them, upon their paying the legal fee of an ordinary extract of the same length. This regulation, however, only applies to Michaelmas meetings; and one may be either enrolled, or struck off the roll, at a meeting for election, without any claim or objection being previously lodged with the sheriff-clerk.

It was once objected to a claim lodged in due time with the sheriff-clerk, that it did not mention the precise sum at which the lands were valued, but only bore, that their valuation exceeded L. 400 Scots. But that objection was not regarded \*.

A

\* 16th Jan. 1754, Sir Archibald Grant *contra* Leith of Leith-hall.

A claim, bearing, by mistake, that the claimant's feifine was recorded in one register, when in fact it had been recorded in another, an objection made on that head was sustained †. This was a most just decision. Claims are ordered to be lodged with the sheriff-clerk to prevent surprise; but a claim that does not lead to a discovery of the claimant's infeftment cannot answer that purpose.

It was likewise objected, that an enrolment could not proceed legally, because the claim had not been lodged with the sheriff-clerk till four of the clock in the afternoon of the 6th of August, and the freeholders convened at the Michaelmas head-court upon the 6th of October before two of the clock; but to this it was held to be a sufficient answer, that, in all cases of legal notice, it is only required, that either the day on which the notice is given, or the day to which it is given, should be free, but not both;

† 5th Jan. 1762, Goldie



both; and that, if either the 6th of August or the 6th of October were reckoned, the full amount of two calendar months would be found to have run, a calendar month being from a day in one month to the same nominal day in another\*.

It was also once determined in a meeting of freeholders, that an objection to a person's continuing upon the roll, though lodged with the sheriff-clerk in due time, could not be taken under consideration, because it was neither signed by any person, nor mentioned by whom, or in whose name, it was given in. But, as none of these things are required by the statute, and as it is in itself a matter of no consequence whether an objection be signed or no, or by whom it is given in, the court had no difficulty of reversing this judgment†. Neither is there any necessity for the claim that is lodged with the sheriff-clerk being signed by the claimant. Indeed, the statute only requires a copy to be left with that officer.

It

\* 15th Jan. 1762, Elliot of Arkleton *contra* Ferguson of Craigdarroch.

† 1767, Ranken of Colden and Irvine of Burleigh *contra* Ramsay of Kinkell and Colvill of Ochiltree.

It is not necessary that a person who claims to be enrolled should attend himself at the meeting of the freeholders. He may appoint one to appear for him, and produce his titles.

It is natural, when no party-work is going on, to take up the consideration of the several claims for enrolment in the order of the dates of their being lodged with the sheriff-clerk; but it is not necessary; and the freeholders have in that matter a discretionary power.

Where two persons are enrolled upon the same lands, the one as *fiar* and the other as *liferenter*, they ought to be distinguished in the roll, by adding the words *Fiar* and *Liferenter* to their respective names.

The freeholders have no power to review or alter at one meeting the proceedings of a former meeting. In the roll made up for the county of Kinross in 1753, General Irvine of Burleigh was, by a mistake of the clerk, put at the foot of that roll, although he had been enrolled before another freeholder, Mr Ranken of Colden. The General

neral made no complaint on that head; but, at a subsequent meeting, held at Michaelmas 1766, where only two freeholders were present, the preses, who had thereby two votes to one, ordered the roll to be rectified, and General Irvine's name to be inserted before Mr Ranken's. But this order was reversed by the court of session, who were justly of opinion, that, as no complaint had been brought within four calendar months after the Michaelmas meeting, 1753, the order of the roll made up at that time could not be altered\*.

The law does not require any number of freeholders to make up a quorum. Even one single freeholder may constitute a meeting, and go through the business†; but, if he

\* 1767, Ranken of Colden *contra* Ramfay of Kinkell.

† An instance of this happened in Orkney some years ago. At the Michaelmas meeting of that county for the year 1760, only one freeholder attended. Five claims for enrolment having been previously lodged with the sheriff-clerk, the several claimants produced their titles, and were admitted to the roll. Some weeks after, complaints were preferred against these enrolments, in the  
name

he admit any persons wrongfully to the roll, any of those who were absent may prefer their complaint to the court of session.

The freeholders ought to meet regularly every year, at the Michaelmas head-court. There is, however, no method of compelling their attendance. What then is to be done, if they all forbear to attend, with a view to disappoint one or more persons who have lodged their claims for enrolment? I know  
of

name of another freeholder, who objected to the legality of the meeting, in respect that it was held only by one freeholder. Before an answer could be put in to these complaints, an election of a commissioner took place; and, as the names of the five gentlemen who had been admitted at the Michaelmas preceding, stood upon the roll which had then been made up, the sheriff-clerk, whose province it was, in the absence of the commissioner last elected, to call the roll for the choice of preses and clerk, refused to call that roll, and called another that had been made up in 1754. This produced new complaints at their instance, for recovery of the statutory penalties to be hereafter taken notice of; and the court, upon advising these complaints, gave judgement in favour of the complainers, and also dismissed the complaints which had been previously brought against their enrolment. 1762, Mackay of Strathy, and others, *contra* John Ridoch, and others.

of no remedy. The case happened in 1753, in the county of Cromarty; but, though a complaint was preferred by a gentleman who had lodged a claim with the sheriff-clerk, two months before the day upon which the meeting should have been held; and although it was strongly argued, that there could be no wrong without a remedy, the court of session refused to interpose in his behalf, and dismissed the complaint as incompetent \*. They indeed had no power to judge of the claim, in the first instance, having no original jurisdiction in matters of enrolment; and they had as little authority to order the freeholders to assemble for the purpose of taking the claim under consideration.

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S E C-

\* 20th December 1753, Mackenzie of Highfield *contra* Freeholders of Cromarty.



## S E C T I O N II.

*Of the Qualifications of a Freeholder, so far  
as respects the Title,*

**H**AVING considered the manner in which the freeholders proceed in making up the roll of their number, the next point in order, is to shew, what qualifications the law requires, to entitle one to be admitted upon that roll.

When James I. dispensed with the attendance of the small barons, and allowed them to send commissioners to parliament, no restraint was imposed. Every person who held of the king was allowed to vote in the choice of these commissioners, how small soever his estate or freehold might be. But, by the statute of James VI. which first brought this representation of the small barons to a regular bearing, none were admitted to vote, but those who had a forty-shilling land in free tenandry, and had their actual

tual residence or dwelling within the shire. By the act 1661, this privilege was extended to all those who were possessed of lands holding of the king, of ten chalders of victual, or L. 1000 of real rent. This, however, was altered by the act 1681; and, in place of the real rent, a new kind of qualification was introduced, which was to be regulated by the valued rent; and it was then enacted, that none should be allowed to vote, but those ‘ who stood publicly inest  
‘ and possessed of a forty-shilling land of old  
‘ extent, holden of the king or prince, distinct from the feu-duties in feu-lands, or,  
‘ where the extent did not appear, stood inest in lands liable in public burden, for his  
‘ Majesty’s supplies, for L. 400 of valued  
‘ rent, whether kirklands now holden of  
‘ the king, or other lands holding feu-ward  
‘ or blench of his Majesty, as king or prince  
‘ of Scotland.’

This statute, which also repealed the act of James VI. so far as it required actual residence within the county, was the standing rule at the time of the union, and is in a

great measure so at this day. The few alterations that have been made upon it will be fully taken notice of afterwards.

The qualifications of a freeholder, so far as they relate to the title, may therefore be reduced to the following: 1st, That the land upon which the right to vote is claimed, be either a forty-shilling land of old extent, or amount to L. 400 Scots of valued rent. 2dly, That such land hold immediately of the king or prince. 3dly, That the claimant be infeft. And, 4thly, That he be in possession.

Each of these shall be considered in its order.

The first divides into two branches, the forty-shilling land of old extent, and the land of L. 400 of valued rent.

In order to explain what is meant by a forty-shilling land of old extent, it will be necessary to enter a little into the antiquities of the law of Scotland.

Land is the first object that presents itself for taxation. A state is generally well advanced,

vanced, before customs or an excise are thought of.

In order to render a tax upon land equal, a general valuation becomes necessary. Such valuation was likewise necessary in Scotland, on another account, namely, for the purpose of ascertaining the non-entry and relief-duties payable to over lords or superiors.

At what time a general valuation first took place in Scotland, cannot with certainty be discovered. The first we have any account of, was probably-made out in the reign of Alexander III. who had occasion for an extraordinary subsidy, to enable him to pay his daughter's portion, upon her marriage with the king of Norway.

This valuation would no doubt exhibit a just state of the rents of the several lands of the kingdom at the time it was made ; but great part of the country having been laid waste during the wars with England, after the death of that prince, these wasted lands necessarily sunk in their value. Hence, when the tax of a tenth of the rents of the laity was imposed, in 1326, to continue

K 3

during

during the life of King Robert Bruce, it was thought reasonable that the proprietors of such lands should not be rated at the old valuation, but should be allowed an abatement, to be settled by an inquest or jury \*. This brought on a revaluation of these particular lands, and made a distinction, even in those days, between old and new extent.

It soon became customary to require the inquest or jury, called in the services of heirs, to ingross in their verdict, or retour, as it is called in the language of the law of Scotland, the valuation of the lands in which the predecessor died inquest. The retours of lands which had not been valued, could bear no other

\* This we learn from the indenture formerly mentioned, between Robert Bruce, and the earls, barons, free tenants, and burghesses. The tenth given to that prince was thereby ordered to be levied ‘ juxta antiquam extentam terrarum et reddituum tempore bonae memoriae Domini Alexandri, Dei gratia, Regis Scottorum illustis, ultimo defuncti; excepta tantummodo destructione guerrae; in quo casu fiet decidentia de decimo denario praeconcesso, secundum quantitatem firmæ, quæ occasione prædicta, de terris et redditibus prædictis levare non poterit, prout per inquisitionem, per vicomitem loci, fideliter faciendam poterit reperiri.’



other valuation but that which subsisted in the reign of Alexander III.; but, where the lands had been revalued in the time of Robert Bruce, the retours mentioned both valuations, and set forth the old extent, or *quantum valuerunt tempore pacis*, and the new extent, or *quantum nunc valent*.

It is plain that, at this time, the new extent must have been lower than the old; but, as the lands which had been laid waste would in process of time recover, and as the lands throughout the kingdom in general improved in their value, the reverse would necessarily hold, after a new general valuation came to be made up.

At what period this general revaluation was made, is not agreed upon. The author of the Historical law Tracts conjectures, that matters continued upon the old footing till 1424, when a subsidy became necessary for paying what was due to England for the subsistence and education of James I.\*. But, from retours prior to that period, and men-

K 4

tioned

\* Black acts, fol. 3. parl. 1484, cap. 10. 11.

tioned in Mr Erskine's Institute of the Laws of Scotland †, we learn, that a revaluation must have been made before that time, as, in these retours, the new extent is higher than the old; and that accurate and judicious author observes, that no period appears more likely for this than the year 1365, or 1366, when a tax was to be imposed for the ransom of David II.

It is, however, certain, that a revaluation took place in 1424 §. But, although the new extent thereby ascertained came to be considerably higher than the old extent in the time of Alexander III. yet the gradual improvement of land, and the rise in the nominal value of money, soon rendered it too low a standard for fixing the casualties of superiority. It was therefore ordered, by an act of James III. 1474, cap. 56. That all retours should specify both the old extent and the precise avail (value) the lands were worth at the time of the inquest's serving the heir to his predecessor. And this last has  
ever

† P. 225.

§ Black acts, fol. 3. 1424, cap. 11.

ever since been called the New Extent.

According to this statute, a proof of the real worth of the lands ought to be taken at the service of every heir. This practice was no doubt followed for some time. But it was too troublesome, and came to be looked upon as too unfavourable for vassals, to be long continued. After lands had once been valued according to the directions of the statute, it was customary for the inquest, in subsequent services, to return the sum at which the new extent had been fixed in such first retour, as the *nunc valent* of the lands: And we are informed by Skene \*, that, where the new extent had not formerly been retoured, it was usual to fix it at the quadruple of the old extent †.

Such

\* De verborum significatione, voce Extent.

† The justness of this proportion is in some degree confirmed by a warrant from Queen Mary, directed to the sheriff of Aberdeen, in 1548, for summoning an inquest to retour all manner of lands in that county, as well church-lands as temporal lands, and the patrimony of the crown; for it directs, that the lands which then gave of yearly mail and duty four pounds, should

Such being the distinction between the old and new extent, it need only be further remarked, that none of the valuations above recited extended over church-lands. The proportion of subsidies payable by the clergy was fixed by different rules. Their revenues were subjected to an equal moiety of all taxations upon land \*, the burden whereof was proportioned according to the value of the several benefices, as they stood upon a roll, called Bagimont's Roll †; and as the church  
never

should be retoured to twenty shillings of old extent, without any exception, or regard to any former retour. A copy of this warrant is to be found in the Appendix, No. 6.

\* Several instances do, however, occur in the statute-book, of a different proportion being observed in laying on taxes, imposed for particular purposes, where the clergy were burdened only with two-fifths, the barons with other two-fifths, and the boroughs with one-fifth. See Black acts, fol. 67. 71. 96.

† This roll contained a full rental of all the benefices in Scotland, as well temporality as spirituality. It is referred to in some acts of the parliament of Scotland, particularly, 1471, cap. 43. and 1494, cap. 39. as a standard not to be altered: and severe penalties are, by these acts, imposed upon those who should give information, at the  
court

never died, to make place for the casualties of non-entry or relief, or to give occasion to retours, there was no room for ascertaining either the old or new extent of church-lands. The first instance I have found of any warrant for retouring, or, more properly speaking, extending or valuing church-lands, is that mentioned in the preceeding note by Queen Mary, in 1548; and although this order seems to have been made with a view that the extent of all the lands of the county might be known, very little regard seems to have been paid to it by the churchmen, or their chamberlains.— It appears, however, to have been intended by the legislature, after the act of annexation in 1587, that the church-lands should pay the taxations in the same manner with the temporal lands: For, by the act 1594, c. 233. it was expressly ordered, ‘ That all ‘ feu-lands annexed to his Majesty’s crown ‘ be the act of annexation, remain with his ‘ Majesty and crown in all time hereafter; ‘ and,

court of Rome, of any higher value of benefices than what is there set down.



‘ and that all feu-lands annexed, or other  
 ‘ feu-lands quhatfumever, within this realme,  
 ‘ be retoured and availed to marke or penny  
 ‘ lands, that his Majesty may know the awn-  
 ‘ er thereof : And, being retoured, that,  
 ‘ when it shall happen ony impost or taxa-  
 ‘ tion to be raised, that the saidis fewares fall  
 ‘ be charged according to their retours.’ In  
 consequence of this act, some church-lands  
 were retoured; and particularly the lordship  
 of Culrofs, as early as 1598, in consequence  
 of a special commission under the great seal.  
 But this notwithstanding, we find, that,  
 upon the first taxation imposed after the act  
 1594, it was expressly ordered\*, that all e-  
 rections of prelacies into temporal lordships,  
 and all dissolved benefices, should be subject  
 in payment of so much of that taxation, as  
 they would have been subjected to if no such  
 erection or dissolution had taken place. We  
 likewise learn, from an unprinted act of the  
 year 1612, that the same rule was observed  
 in the taxation then imposed for payment of  
 the Princess Elizabeth’s portion; and, in fact,  
 it

\* 1597, c. 281.

it continued to be observed down to the time of the troubles in the reign of Charles I. when a new mode was introduced of levying the land-tax by monthly assessments, in consequence of new valuations, which will fall to be more particularly taken notice of in the sequel.

Having thus endeavoured to explain what is meant by the old extent, mentioned in the act 1681, I shall now proceed to consider, what evidence a person who wants to be enrolled upon a qualification of that sort must bring, to shew that his lands are truly a forty shilling-land of that extent.

The act 1681 is silent upon this head; and, prior to the act of the 16th of George II. c. 11. any satisfactory evidence of the fact might be resorted to: But, by that statute, it was expressly declared\*, that no person should be intitled to vote for a commissioner to serve in parliament for any shire in Scotland, or to be enrolled in the roll of electors in respect of the old extent of his lands, unless such extent were proved by a  
retour

\* § 8,

retour prior to the 16th of September 1681; and that no division of the old extent made since that day, by retour, or any other way, should be sustained as sufficient evidence of such extent\*. No series of charters, however

† What was the capital object the framers of this statute had in view, by this clause, I shall not pretend to say. But I must own, that I have in vain endeavoured to find any good reason for these restraints. The reason announced by the statute itself, viz. ‘ That great difficulties had occurred in making up the rolls of electors of commissioners for shires, by persons claiming to be enrolled, in respect to the old extent of their lands, where the old extent did not appear from proper evidence, and votes had been unduly multiplied, by splitting and dividing the old extent of lands since the 16th of September 1681,’ is very unsatisfactory. If a claimant was not able to bring proper evidence to instruct his old extent, the freeholders were under no obligation to admit him to the roll; and, if they did admit him, the court of session, upon a complaint being made to them, could order him to be struck off. Why then exclude every other evidence but that of a retour prior to 1681? Had all the old retours of services been preserved, or had a regular record of them been extant, there might have been little ground of complaint. But that was by no means the case. There never was a record of retours established by public authority; and I have been credibly informed, that no such register was known till the year

ever long and uninterrupted, can therefore now be admitted to shew the old extent, or supply

1633, when Sir John Scot of Scottstarvet, who was then director of the chancery, instituted one, for recording not only the retours in time to come, but even those in time past; for which purpose, he was at great pains to collect, from private hands, the original services which were formerly in use to be delivered back to the parties when they obtained their precepts for infeftment, nothing being kept in chancery but the brieve and the executions. In this search Sir John was pretty successful, and got a great many old services, but none prior to the year 1546, thought there are some still extant, elder than the year 1400. These he recorded as they came to hand; and hence we find, in the books for the years 1633 and 1634, some as old as 1546: We may, however, well suppose, that the greatest number of the old retours had been lost before this record was instituted; and it is a certain fact, that many persons are able to shew a progress of titles to their lands, for 100 or 200 years prior to the beginning of the last century, without one retour among them, although they have in their possession, at the same time, many seifines proceeding upon retours. This statute of the 16th of George II. by cutting off every kind of evidence of the old extent but retours prior to 1681, did therefore deprive many who were truly possessed of a forty shilling-land of old extent, from being admitted to the roll, notwithstanding that they had a title equally good with those who could prove their extent by such

ply the want of a retour\*: Nay, even a retour itself, though in the description of the lands it mention them to be a four or five pound land, will not be sufficient, unless the extent be particularly set forth in the *valent* clause†. But, a retour of several lands valued together

such retours, and notwithstanding, that the evidence arising from their charters was equally satisfactory, the extent being therein mentioned, and no person being under any temptation (especially in those days, when the service of parliament was considered as a burden, rather than a privilege) to ask a higher extent to be inserted in his charter than the true extent, according to which he was to be liable in payment of the land-tax. This seems to be somewhat unreasonable; and the preventing a freeholder from dividing his old extent, the consequence whereof is, that, though he be possessed even of a L. 20 land, yet, if he sell but a tenth-part of it, neither he, nor the purchaser from him, can be admitted to a vote, appears to me in the same light. I am no friend to the rearing up of nominal and fictitious votes; but the political constitution of Scotland, even before the date of this statute, was such, as to remove any apprehension of evil from a multiplication of real and fair qualifications.

\* 22d Feb. 1745, Sir Michael Stewart *contra* Hugh Crawford.

† 22d Feb. 1745, Sir Michael Stewart *contra* Campbell of Ellerfly.



together, which mentions their respective values in the descriptive clause, and the sum total in the *valent* clause is held as sufficient evidence of the extent of each particular land, if the sum total so mentioned in the *valent* agrees with the several values in the descriptive clause \*.

It is not, however, necessary that the principal retour itself be extant. Extracts from the record in chancery are sustained as sufficient evidence of the old extent †. But a certificate under the hands of one of the keepers of the records in the lower parliament-house, bearing, that, upon searching a record of old extent, made up in 1613, he found the lands, upon which a claim had been entered for enrolment, extended, in that record, to L. 8 : 8 : 2, was not held to be

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\* Falconer's Decisions, 18th January 1745, and 5th February 1745, Colquhoun of Lufs *contra* voters of the shire of Dunbarton.

† 5th February 1745, Colquhoun of Lufs *contra* freeholders of Dunbartonshire. 29th July 1761, Mackie of Barmore *contra* Sir William Maxwell and other freeholders of the county of Wigton.

a proper instruction of the old extent, in terms of the statute\*.

The statutes require a forty-shilling land of old extent. In 1766, a freeholder claimed to be enrolled upon two twenty-shilling lands, the extent of each of which was instructed by a retour prior to the year 1681. The Michaelmas meeting refused to admit him to the roll; but the court of session reversed their judgement †.

Lands on which a person claimed to be enrolled, being proved, by a retour prior to 1681, to have been extended together with  
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In the case of Tytler of Woodhouselee, who, for proof of his old extent, referred to an extract from the record in chancery, of a retour made up before the sheriff of Edinburgh in 1554, of the whole lands within the county, it was objected, that this record concluded with the words 'in cujus rei testimonium,' without bearing that the seals of the jurors were appended, or mentioning the name of the clerk, or his subscription. But this objection was repelled, 19th November 1755, Andrew Chalmer *contra* William Tytler.

\* 17th February 1767, Sir John Gordon *contra*  
This judgement was affirmed in the house of lords 4th May 1767.

† 1767, Sir Michael Malcolm *contra* Ramfay of Kinkell.

an annualrent of one merk out of certain other lands, to ten merks; the retour was held to be sufficient evidence that the lands were of the extent required by law to the constitution of a freehold-qualification; for, as annualrents are always retoured *valere seipfos*, there was clear proof, from the retour, that the lands, without the annualrent, were nine merks of old extent\*.

It is not a good objection to a retour, that there were not fifteen jurymen upon the inquest. Though that is the ordinary number, it is not necessary there should be so many. And, in the records of chancery, we find, in the space of ten or eleven years, from 1619 to 1630, no less than twelve different retours, having only twelve persons on the jury, four having only eleven, and one having only ten upon it†.

By the statute of the 16th of George II. no division made since the 16th of September 1681, by retour, or any other way, can

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be

\* 20th November 1757, Fordyce *contra* Urquhart.

† See 28th July 1761, Mr Walter Stewart *contra* Mr David Dalrymple; and 15th January 1762, Stewart *contra* Sir William Maxwell.

be sustained as evidence of the old extent. In consequence of this enactment, the court of session found, that a twenty-merk land, being divided into two moieties, and vested in two different proprietors, neither of them had a title to be enrolled, although the division had taken place, by a voluntary contract, as old as 1671, which mentioned the particular extent of the several farms, making up ten merks to each moiety \*.

It was objected to a retour, that it could not be received as evidence of the old extent, because, at the time of its date, the lands held of a subject-superior. In support of this objection, it was pleaded, that, as the taxations formerly granted in favour of the crown were proportioned amongst the crown's vassals according to the old extent, it was necessary that their retours should set forth the amount of that extent; but that this was not necessary with respect to lands holding of a subject, the vassals in such lands not being directly liable to the king's

\* 6th February 1745, freeholders of Lanarkshire *contra* Hamilton of Westburn.

king's taxations, but only to their own superiors in relief, and that too not in proportion to the true old extent, but according to the benefit they reaped from their feus, or the agreement they had made with their superiors: That, on this account, juries were under no necessity of inquiring minutely into the real old extent, except where the lands held of the king or prince: And that it accordingly appeared, that, in many charters granted by subject-superiors, the old extent had been screwed up as high as the feuduty, and the subsequent retours made to correspond with these charters. But to this it was held a sufficient answer, that the act of James III. 1474, cap. 55. appointed all retours upon brieves of inquest, without distinction, to contain the old and new extent; that they are all the verdict of a jury upon oath, and must be held as good evidence, till falsified in course of law; and that, although the act of the 16th of George II. had rejected all other proof of the old extent, yet it mentioned retours in general, without distinguishing whether, at the dates of such



retours, the lands contained in them held of the king, or of a subject-superior \*.

A question of greater difficulty occurred a few years ago. We have already seen, that, in consequence of the act 1594, c. 233. the lordship of Culrofs, which had formerly been an abbay, was retoured in 1598, in virtue of a commission under the great seal. 'At the Michaelmas meeting of the freeholders of the county of Perth, held in 1760, four claims were offered for enrolment, all of them upon different parcels of this lordship; and for evidence of the old extent of these different parcels, the claimants appealed to the retour 1598. The freeholders admitted them to the roll; but it was objected, in a complaint to the court of session, that no retour was sufficient to prove the extent, but such as proceeded upon brieves for serving heirs, in which both the old and new extent are set forth; that there was no room for such brieves in church-lands, nor was it necessary

\* 26th July 1753, Colonel Ambercrombie *contra* Baird of Auchmedden. 28th July 1761, Mr Walter Stewart, and others, *contra* Mr David Dalrymple.

necessary for them to be extended, in respect that they paid their proportion of the king's taxes, by a different rule; that, altho' the act 1594 appointed all feu-lands annexed to the crown to be retoured to merk and penny lands, it did not declare these merks or pennies to be the old extent; that, as that extent was of as old a date at least as the reign of Alexander III. a retour in 1598, which was the first that put any valuation on these church-lands, could not shew what was their true extent and worth, two or three centuries preceding that period; and although it bore to have been made 'secundum antiquum extentum,' it was only thereby meant, that the lands had been valued in proportion to the old extent of other lands of the same kind or quality, in the manner the lands of the king's property were directed to be extended by the act 1597, c. 281.; that the act 1661, c. 35. allowed no votes upon church-lands, but such as yielded ten chalders of victual, or L. 1000 of rent, after deducting the feu-duties payable to the crown; that the act 1681, c. 21. in like

manner, allowed no persons to vote upon church-lands in respect of the old extent, but only in respect of the valued rent; and that the act of the 16th of George II. which admitted no evidence of the old extent but retours, did thereby mean to refer to verdicts upon brieves, for serving heirs, but not to such retours as that appealed to by the claimants, which was made in consequence of a commission under the great seal.

To these objections it was answered, that neither the statute 1681, nor the act of the 16th of George II. required, that the old extent should be proved by a retour upon a brieve for serving heirs; and any retour was sufficient for that purpose, provided it was prior to the 16th of September 1681; that altho' it was not necessary to retour church-lands, prior to their annexation to the crown, yet, as it was then resolved, that all the lands throughout the kingdom should be taxed in one and the same manner, directions were given by the acts 1594, and 1597, for retouring all the annexed lands; and it was  
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in consequence of these acts the commission issued, in virtue of which the retour in question was made; that as the purpose of retouring these lands was to ascertain the old extent, so there could be no difficulty in fixing it; that many temporal lands had been acquired by the church, after the days of Alexander III. when the old extent was struck, and when no certain evidence of it remained, the jurors were authorised, by the act 1597, 'to retour the lands to the same avail, quantity, and proportion, as any other lands lying next adjacent to the same, holding of his Majesty, were retoured to;' that this was the rule in chancery, by which inquests are directed to extend lands, when no antient record appears of the old extent; that it had been the practice of the freeholders in the several counties, to receive such retours as the one in question; and that the old extent of most of the lands in Mid-Lothian was only vouched by a similar retour, dated in March 1554, and made for the very purpose of ascertaining it.

The

The court repelled the objections to the retour, and dismissed the complaint. \*.

The eldest of several heirs-portioners enjoys some privileges over the others. Dignities or honours that can pass to females descend to her alone; and she is likewise intitled to all subjects that, by their nature, do not admit of a division. How will this affect

\* 27th February 1761, Mr David Moncrieff *contra* Erskine of Balgonie, and others. A similar question occurred, the very same year, from the county of Wigton. A retour in 1625 being appealed to as evidence of the old extent, it was objected, that the lands therein contained were church-lands, formerly part of the see of Galloway; and therefore could have no proper old extent. The court accordingly found, that the retour produced was no proper evidence of the old extent of the lands; 28th July 1761, Mr Walter Stewart, and others, *contra* Mr David Dalrymple. But as this judgement was carried by the smallest majority possible, so it was reversed in the house of lords, 1st April 1762.

In another case, prior to either of these, it was found, that lands which had been mortified to the college of Aberdeen, with the common *reddendo* of *preces et lachrymae*, and were afterwards sold by the college, afforded a freehold-qualification to the purchaser; 4th March 1755, Mr David Dalrymple, and others, *contra* Sir James Reid of Barra.



affect a freehold-qualification, supposing the son of an elder sister and two younger sisters to succeed to a forty shilling-land of old extent? The case occurred in the shire of Berwick in 1747. Moffat of East Morieston died, leaving three sisters. The eldest dying, her son claimed to be enrolled; but, as he had only right to a third of the lands, and his aunts had right to the other two-thirds, *pro indiviso*, it was found, that he had no title to be admitted upon the roll \*. The same rule will hold when the qualification depends upon valued rent †.

The act 1681 requires, that the old extent be distinct from the feu-duties in feu-lands. This needs an explanation. Feus  
were

\* 10th November 1747. Freeholders of the shire of Berwick *contra* Primrose. This decision shows how difficult it is, at times, to reconcile law with common sense. Had this estate been only a superiority, it would have gone to the eldest sister, as an indivisible subject, and her son would have had a good title to a vote. Here then is an instance of a person's being the worse of having the property, as well as the superiority.

† See 6th March 1760, Sir Michael Stewart *contra* Captain Pollock.

were called improper fees, and considered by feudalists in the light of locations. The annual feu-duty was reckoned to be the worth of the lands; of course, when such lands came to be retoured, the old and new extent fell to be the same: And the retours of such lands do at this day bear ‘*Quod nunc valent feudifirmam, et valuerunt tantum tempore pacis.*’ But as, by the acts 1594, c. 233. and 1597, c. 281. the annexed lands, and the king’s property-lands, were ordered to be retoured, and as, by the last of these acts, the stewards and bailies were directed, in making these retours, ‘to have ‘ane special regard to the free rent that the ‘fewars and rentallars hes of the same lands, ‘beside their feu-fermes and dewties paid ‘be them to our soverane lord;’ so, in consequence of the directions of these statutes, many public retours were made and transmitted to chancery. Now, as the old law required, that one should be possessed of a forty-shilling land, or, in other words, be liable in payment of taxes in proportion to a land of that extent, to intitle him to vote for

a commissioner to parliament; so it was reasonable, that those who held feu should instruct, that the free rent of their lands, after payment of their feu-duties to the king, was of that extent, the feu-duties being no part of their estate, but, on the contrary, a burden upon it, for which it was not intended they should pay any part of the taxes. Hence it was, that the act 1681 required, that, in feu-lands, the extent should be distinct from the feu-duties. Where that is the case, the lands are entitled to a vote; but where the extent is made the same with these feu-duties, they have no such privilege, how high soever it may be \*.

Having exhausted what seemed necessary to be observed with regard to the old extent, the next thing to be considered, is the other branch of the first qualification, depending upon lands liable in public burdens for his Majesty's supplies for L. 400 of valued rent.

The

\* See 19th January 1745, Freeholders of Lanarkshire *contra* Hamilton of Withaw. 14th June 1746, Freeholders of Linlithgow *contra* Cleland. 24th June 1747, Freeholders of Perthshire *contra* M'Ara,

The old extent continued long to be the rule for proportioning the land-tax amongst the temporal lands of the kingdom of Scotland \*. The tax imposed in 1633, was regulated

\* This seems to be universally agreed upon; but still a darkness attends the subject, notwithstanding all that has been wrote or said upon it. That the land-tax was levied from the temporal lands, according to an old extent, and that so much was laid upon every pound-land, is certain; but, that one particular valuation was always understood by the words *old extent*, or was constantly observed as the rule for levying taxations upon land, does by no means appear. On the contrary, every general valuation of lands which we discover, either from our statute-book, or from other records, was made at a time when some public tax was about to be imposed; and, altho' authors differ as to the period at which the first general revaluation, after the time of Alexander III. took place, they all fix upon some particular time when it is to be supposed that the exigencies of the state would require a considerable sum to be raised. The author of the *Historical Law Tracts* is of opinion, that no such revaluation was made till the reign of James I. But Mr Erskine having discovered returns prior to that time, in which the new extent is higher than the old, does with reason conclude, that a revaluation must have taken place sooner, and pitches upon the year 1365, or 1366, as the period of such revaluation, because it must then have been necessary to raise money for the ransom of David II. How then can it be said, that  
the

gulated by it; but, in the time of the troubles under Charles I. a new and different method was introduced for levying the large sums that were then imposed upon the proprietors

the tax imposed upon either of these occasions was levied according to the extent in the time of Alexander III.? Or that what we now call the old extent, in opposition to the new extent, was the valuation taken at that time? In matters of uncertainty, there can only be room for conjecture. Perhaps the old extent, which was mentioned in the retours after the act of James III. 1474, cap. 56. was the valuation which was made in the time of James I. there being no evidence of any general valuation between these two periods, and the rule by which the taxes laid upon the temporal lands of the kingdom were afterwards levied. At the same time, it must be confessed, that, from the warrant by Queen Mary to the sheriff of Aberdeen in 1548, to be found in the appendix, it would appear, that it was then in view to follow a different rule from that of any former extent, for levying the tax that was intended to be laid on at that time; for, after mentioning that a general tax of men and money would be necessary, and that such tax could not be made till the value and extent of all the lands within the realm were known, it directs the sheriff to convene an assize, to retour all the lands within the shire, in manner following, viz. 'The lands that give presently of yearlie maill and duty four pounds to twenty shillings of old extent, general and universal, without any exception or regard to any retour passit of before.'



prietors of land. Monthly assessments were laid on; and, for the purpose of rendering them equal amongst the subjects, new valuations were made by commissioners appointed for that end, who were ordered to inquire into the just and true worth of every person's rent, 'to landward as well of 'lands and teinds, as of any other thing, 'whereby yearly profit and commoditie ariseth \*.' By two acts of Oliver Cromwell's parliament, held at Westminster in 1656 †, certain quotas of the general assessment were laid upon each particular shire; and these quotas were left to be proportioned by the commissioners, amongst the several landholders, according to the rates at which their respective lands were valued. Upon the restoration, the old mode of levying the land-tax by the rule of the old extent was revived ‡; but when the next taxation was imposed in 1667, the new method was again adopted.

\* See act of convention 15th August 1643, and rescinded acts, August 1649, c. 21.

† C. 14. c. 25.

‡ Act of the convention of estates, 1665.

adopted. A certain sum was laid upon each county, nearly in the same proportion with that which had been fixed at Westminster in 1656: And the commissioners appointed for levying and collecting it were directed to proceed according to the former valuations, where they appeared equal and just, and to rectify them when they appeared to be erroneous; and also, to make new valuations where estates had been dismembered, and conveyed in parcels to different persons \*. The rule laid down by this act has ever since been observed. Commissioners are always named for levying the land-tax, and for that end are empowered to do every thing necessary for adjusting the valuations of the several lands within their respective counties. It is the rent fixed by these valuations which is now called the Valued Rent, in opposition to the old and new extent; and it is incumbent upon every person, who is not possessed of a retour prior to the 16th of September 1681, shewing

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\* Act of convention 1667.

that his lands are of forty shillings of old extent, to instruct that they are rated at L. 400 Scots in the valuation-books of the county, before he can claim to be inrolled as a freeholder.

The rage for getting a seat in parliament, which has prevailed for a number of years past, has been productive of sundry abuses that could not be foreseen by the legislature. Those who are possessed of great estates, and want to split them into a number of freehold-qualifications, to be bestowed on their friends and confidants, for the purpose of strengthening their political interest, must apply to the commissioners appointed by the land-tax acts, (commonly called the commissioners of supply), for a division of their total or *cumulo* valuations, unless they can shew, that the several parcels into which they have so split their estates, are forty shilling-lands of old extent. Hence a door is opened for jobbing amongst these commissioners; and, if a majority of them be in an opposite interest, it sometimes happens, that every obstacle is thrown in the way to prevent

prevent or retard the divisions of valuation which are sought by those who intend to claim to be enrolled as freeholders.

The commissioners of supply, in making such divisions, ought no doubt to regulate themselves by the real rent of the several parcels into which the estate is divided, and to proportion the total valued rent accordingly. But, supposing they should disregard that rule, and lay more of the valued rent upon some, and less upon others of these parcels, than in justice they ought to have done, and thereby frustrate the scheme in view, and give the proprietor who splits his estate, for the purpose of creating new qualifications, fewer of them than it might have produced, had the valued rent been fairly divided; what remedy lies in such case, or in others of a similar nature? Their proceedings are subject to the review of the court of session, as the supreme civil court of the nation; and, in a process of reduction, that court does not only judge of the justice or injustice of such proceedings, but even sets the decrees of the commissioners a-

side upon nullities in point of form \*. Nay, further, they frequently judge of such decrees by way of exception in the course of complaints relating to the qualifications of freeholders; but, if a division be made by a general meeting of the commissioners, and appear *ex facie* to be regular, it can only be set aside in a formal process of reduction †.

Instances have occurred of commissioners of supply refusing to divide valuations. I shall mention two. The first occurred in the year 1757, in the stewartry of Kirkcudbright. A small estate, consisting of many parcels of houses, acres, &c. being split amongst a number of purchasers, they in a body petitioned the commissioners of supply to divide the total valuation, for the purpose of ascertaining what proportion of the land-tax each of them should pay.

The

\* 12th February 1751, Sir John Gordon *contra* Gordon of Embo. 21st February 1753, Colonel Abercrombie *contra* Leslie. 9th January 1754, Cuninghame *contra* Stirling.

† 18th February 1755, Forrester *contra* Preston. 31st January 1772, Major-General Grant *contra* Robert Duff of Logie, and others; affirmed in the house of lords May 1772.



The commissioners, unwilling to split the land-tax payable for the whole into so many fractions, refused the petition; but, the matter being brought before the court of session, the conveyer was appointed to call a general meeting, in order to divide the valuation amongst the several purchasers\*.

The other instance occurred, nine years after, in the shire of Angus. William Earl Panmure, by twenty-two several dispositions or feu-rights, conveyed so many parcels of his estate to his brother, Mr Baron Maule, for the yearly payment of sixpence two-thirds of feu-duty for each parcel; and having thus divested himself of the property, obtained a new charter from the crown upon his own resignation, in favour of himself, his heirs and assignees, after which he granted conveyances to twenty-two different persons in liferent, and to himself in fee, of the several lands formerly feued out to his brother. These liferenters being in-

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\* 4th August 1757, Malcolm and others *contra* commissioners of supply for the stewartry of Kirkcudbright.

applied to the commissioners of supply, to divide the *cumulo* valuations amongst them, in proportion to the real rent of the lands severally conveyed to them. The commissioners refused their petitions, upon the pretence, that a division into so many parts would occasion great and unnecessary trouble, and render the payment of the land-tax more difficult and precarious; and that they were not bound to give encouragement to proceedings that were evidently carried on with no other view than to create a number of nominal and fictitious votes, contrary to the principles of the constitution, and to the express enactment of many salutary laws. The petitioners, upon this, applied to the court of session by bills of advocacy, and obtained an order in the following words: ‘ The Lords refuse to advocate; but remit to  
‘ the commissioners of supply to ascertain the  
‘ value of the complainers lands, by disjoining the same, in the cess-books, from the *cumulo* valuation of the estate with which they  
‘ stand presently valued; and appoint the conceener of the commissioners to call a meeting

ing as soon as convenient for that purpose \*.  
And the commissioners having afterwards  
thrown fresh obstacles in the way, the court,  
upon a new application, pronounced another  
order in the following words: ' The Lords  
' having heard this petition, they appoint  
' the commissioners of supply for the shire  
' of Forfar, or any five of their number, to  
' meet at the town of Forfar, in the place  
' where their meetings are commonly held,  
' upon Thursday the 12th instant, by ten  
' o'clock forenoon, and not sooner, and to  
' proceed directly to expedite the division of  
' the valuation of the several lands wherein  
' the petitioners stand infest; and, in order  
' that the same may not be disappointed or  
' postponed improperly, appoint the said  
' commissioners, or their quorum aforesaid,  
' at their said meeting, to take proof of the  
' real rents of the several lands which the  
M 4 ' petitioners

\* 15th November 1766. William Earl Panmure, and others, *contra* the commissioners of supply for the county of Forfar. This judgement was affirmed in the house of lords 10th February 1767, with L. 200 of costs.

‘ petitioners shall insist are necessary to be  
‘ be proven, by examining such witnesses as  
‘ the petitioners shall, upon that occasion,  
‘ adduce before them, who, if any objection  
‘ is made, are notwithstanding to be ex-  
‘ amined, reserving the consideration of the  
‘ objections till the division comes to be  
‘ judged of; and, after the proof is taken,  
‘ appoint them immediately to proceed to  
‘ determine upon the import of it, and make  
‘ the division accordingly: And, if the com-  
‘ missioners shall find it necessary to adjourn  
‘ their meeting, by reason that a quorum of  
‘ five of their number cannot be got to con-  
‘ tinue together till the affair is concluded,  
‘ the Lords, in that case, allow, authorise,  
‘ and appoint the adjournment to be made  
‘ to the first day thereafter that any five of  
‘ the commissioners shall declare their wil-  
‘ liness to attend, who, in that case, are  
‘ appointed to meet at the same place and  
‘ hour, and to proceed in the said mat-  
‘ ter with dispatch: And, if any further  
‘ adjournment or adjournments are found  
‘ necessary, for the want of a quorum wil-  
‘ ling

‘ling to sit longer, appoint the other ad-  
‘journments to be made according to the  
‘rule above directed; and discharge every  
‘other business to be taken up by the com-  
‘missioners at the said meetings until the di-  
‘vision of the petitioners valuations is con-  
‘cluded; and declare, that no adjourn-  
‘ment made by the majority of any meet-  
‘ing shall hinder any five of the commis-  
‘sioners to proceed who are willing; and,  
‘in the last place, appoint the clerk, by  
‘himself, or a depute, for whom he shall be  
‘answerable, to attend the meetings regu-  
‘larly, while a quorum of five commission-  
‘ers continue together on the said affair.’ A  
similar order was given upon the 18th De-  
cember 1772, relative to a division of the  
Duke of Gordon’s valued rent in the coun-  
ty of Banff.

Many questions have occurred with regard  
to the validity of decrees of division of va-  
luation. It will therefore be proper to con-  
sider in what manner the commissioners  
ought to proceed, so as to act regularly in  
matters of that kind.

The



The annual acts imposing the land-tax name a number of commissioners for each county; but as it is impossible the legislature can know whether or no all the persons suggested to them are possessed of property, or have an interest in the county sufficient for presuming them worthy of that trust, a proviso is constantly thrown in, that none of the persons so named shall be capable to act, who is not infeft in superiority or property, or possessed, as proprietor or liferenter of lands, valued in the tax-roll of the county where he acts, to the extent of L. 100 Scots *per annum*, except the eldest sons and heirs-apparent of persons who are so infeft of lands to that extent and valuation, and provosts, bailies, deans of guild, treasurers, masters of merchant-companies, or deacons conveners of the trades, for the time being, of any royal borough, and bailies for the time being of any borough of regality, or barony; and that any who, being so disqualified, shall take upon him to act, shall forfeit L. 20 Sterling for every such acting, to be recovered by action, complaint, or petition,

tition, in a summary way, at the suit of any heritor within the county, before the county-court, or the court of session \*.

The commissioners are ordered to meet at the head-boroughs of their several shires, on a certain day named in each act, and are empowered to appoint the subsequent diets of their meetings, and to name their conveners from time to time. This is wisely ordered, to prevent packed meetings of a few commissioners, for the purpose of serving a job; and it has accordingly been found, by the court of session, that a valuation cannot  
be

\* In a question from the county of Cromarty, two different persons were found qualified to act in virtue of the same lands, although neither of them was the immediate vassal of the crown. The case stood thus: Anderson of Udal was base infest, upon a disposition from Mr Hugh Anderson, who held of the proprietor of the estate of Cromarty; and this sub-vassal having conveyed the lands to Henry Davidson, who infest himself base upon the precept in that conveyance, both were found qualified to act; 21st January 1766, Sir John Gordon *contra* Anderson. If this decision be well founded, it is hard to say where to stop. It would seem, that as many may act, in respect of one parcel of land of L. 100 valuation, as there may be sub-feus of it granted.

be divided, except upon the day of meeting named in the act, or at a meeting by adjournment, or a general meeting properly summoned by the conveener \*. But if a division made by a private meeting, be confirmed or homologated by a subsequent legal meeting of the commissioners, it will be thereby validated †.

The acts imposing the land-tax are very inaccurate in one respect, namely, as to the number of commissioners that must be present, in order to constitute a quorum ; but, in practice, the commissioners act at their meetings, as if they were not confined to any quorum. See upon this point, Statute Law Abridged, p. 429. In the case from the counties of Forfar and Bamff above mentioned, where the court of session ordered any five of the commissioners to proceed in the divisions, the judges shewed, that they did not consider any greater number to be necessary to make up a quorum.

In

\* 21st February 1753, Abercrombie *contra* Leslie. 9th January 1754, Cunningham *contra* Stirling.

† 6th March 1754, Campbell *contra* Stirling.

In 1756, a question occurred, Whether the conveener could call an immediate general meeting, notwithstanding an adjournment made by the commissioners to a more distant day? The court of session found, he might do so, upon the application of any person having interest\*.

The land-tax act 1748, and other annual acts since that time, have provided, that the commissioners of supply thereby named, should, before acting in that character, take and subscribe the oaths of allegiance and abjuration, and subscribe the assurance appointed by law to be taken and subscribed by persons in offices of public trust in Scotland, under the pain of forfeiting the sum of  
L.

\* 14th December 1756, Sir Robert Gordon, and others, petitioners. In this case, the conveener, when desired to call a meeting for the purpose of proceeding in a division, was doubtful of his powers. The parties interested in the division applied to the court of session by petition; and as it appeared to the court, that the conveener had himself no objection, but only wanted their authority for calling the meeting, the deliverance was given, without ordering the petition to be served either upon him or the commissioners.

L. 20 Sterling. That commissioners, who take it upon them to act as such, without complying with this proviso, are liable to the penalty, cannot be disputed. But, as the statutes do not declare the proceedings of such commissioners to be void and null, it came to be made a question, whether a division of a valuation could be quarrelled upon that ground; and the court of session, in a reduction of a decree of division made by the commissioners for the shire of Caithness, found, ‘ that the commissioners not having taken  
 ‘ the oaths of allegiance and abjuration,  
 ‘ pursuant to the act of parliament 1749,  
 ‘ were not capable to act in the execution of  
 ‘ that statute; and therefore found the division void \*.’

In order to render the procedure in a division of valuation valid, all parties interested in the *cumulo* valuation, or whose proportion

\* 22d February 1751, Sutherland of Swinzie *contra* Sutherland of Forse, &c. Perhaps the recency of the rebellion 1745, and the zeal of the judges to curb Jacobitism, may have contributed somewhat to the pronouncing of this judgement.



portion of the land-tax may be affected by such division, must be called or concur; but it is not necessary to make the superior a party, whatever influence the division may have upon his political views\*.

The regular method of dividing *cumulo* valuations, is by proportioning them according to the real rents at the time of division. But, when the cess has been in use to be paid by the vassals, in certain proportions, for a considerable space of time, the commissioners may follow that rule, without inquiring nicely into the justness of such proportions. It is not to be presumed, that any of the vassals will voluntarily agree to pay a greater proportion of the land-tax than truly corresponds to his real rent†. But, if a person, possessed of an estate of little more than L. 400 of valued rent, should sell the one half of it, and, with a view to retain a freehold qualification, become bound to take upon himself the payment of the whole land tax, or of such

\* 24th July 1660, Earl of Hume *contra* Broomfield.

† 17th January 1755, Galbreath *contra* Cunningham.

such a proportion thereof, as would correspond to L. 400 of valued rent, it might be argued, that a division proceeding upon the use of payment, conformable to such agreement, ought not to be sustained to the effect of entitling the feller to claim a right to vote as a freeholder, because, although his lands did actually pay his Majesty's supplies for L. 400 of valued rent, yet they neither were liable, nor was there just ground to presume them liable in payment of such supplies to that extent. But, where a person obtains a division of his *cumulo* valuation, in the view of parcelling it out in different freehold-qualifications, trivial objections will not be listened to. He can never make more votes out of his estate than its total valuation will bear; and it is of little moment, that one parcel may have got a greater, and another a smaller proportion, than they would have been entitled to, if the division had proceeded with all the accuracy possible. In the case of General Grant against Duff of Logie, and others, the court of session reduced a decree of division of the estate of  
Innes,

Innes, on account that no proper evidence had been brought of the real rent of a part of that estate, the witnesses having only referred to an estimate, said to have been made by sworn appraisers, appointed by the sheriff of Murray, who however afterwards appeared not to have been put upon oath; but the house of lords reversed this judgement \*.

The commissioners of supply, being the only persons entrusted with the adjustment of the valued rent, the freeholders cannot take any other evidence, that lands upon which a claim is entered for enrolment are of the valuation required by law, than what arises from their books. It is not, however, necessary that the books themselves, or even extracts from them, be produced; a certificate under the hands of two commissioners, and of the clerk of supply, is held to be sufficient evidence of the fact †.

By the act 1681, there was only place for the qualification of valued rent, in case the

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old

\* February 1773.

† 5th February 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell.

old extent did not appear; so that a person, whose lands were actually retoured to a less extent than forty shillings, could not be enrolled, how great soever his valued rent might be. But this was altered by the act of the 16th of George II. which expressly declares \*, ‘That lands holden of the king or prince, liable in public burdens for L. 400 Scots of valued rent, shall, in all cases, be a sufficient qualification, whatever be the old extent of the said lands, any law or practice to the contrary notwithstanding.’

The statutes establishing the right of voting confine the qualification to lands. Hence it was found, that a charter of the offices of coroner and serjeant, though held of the crown by the tenor of ward and relief, and retoured prior to 1681, did not entitle one to be enrolled †. Fishings, if valued in the cess-books, are however sustained, in order to make up the qualification of L. 400 Scots.

\* Sect. 9.

† 14th January 1761, Andrew Stewart *contra* freeholders of Lanarkshire.

Scots \*. The teinds of a man's own lands, if separately valued, and purchased by him from the titular, may likewise be taken *in computo* for that end †; but it is not necessary for a person, whose lands are valued in the books of supply at L. 400, to shew that he has an heritable right to the teinds of such lands §. It has not been determined, whether one can be enrolled upon the teinds of another person's lands, though separately valued in the cess-books. The question has never hitherto occurred. And, though the argument in the case of Dunbar against Sinclair proceeds upon the supposition that they could not afford a freehold-qualification, it may surely be maintained, that teinds are as properly comprehended under the word *Lands* as fishings, which are held to afford a sufficient title.

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We

\* 10th July 1745, freeholders of Aberdeenshire *contra* Fordyce. *Eodem die*, freeholders of Dunbartonshire *contra* Campbell.

† 29th January 1745, Dunbar *contra* Sinclair.

§ 3d March 1753, Captain Scott, &c. *contra* Captain Sutherland.



We come now to the second qualification respecting the title, viz. That the lands on which the claim is founded must hold of the king or prince. This may appear a hardship, in the present state of Scotland. Many persons are possessed of large estates, who are incapable to elect, or be elected commissioners to parliament, because they only hold them of subject-superiors; while, on the other hand, many, by holding immediately of the crown, are entitled to that privilege, although the value of their estates (if consisting of a bare superiority) does not, perhaps, yield them a penny in the year. Whether this be worthy of the attention of parliament, must be left to those who have it in their power to interpose in such matters. It is sufficient here to observe, that the law, as it stands at present, is perfectly founded upon the original constitution of parliament, which neither required nor admitted the attendance of sub-vassals, who were considered to be fully represented, in the great council of the nation, by their immediate over-lords, or superiors.

This,

This, however, cannot, with so much propriety, be said to have been the case after the act of James VI. 1587, when the small barons came themselves to attend only by representatives. The vassals of the greater barons might still be said to be represented by their superiors, each of whom was entitled to a seat in parliament: But the case was different with the vassals of small barons, of whom only two out of each county were admitted to that privilege.

A person claimed to be enrolled, partly upon his right to the superiority of certain lands, and partly upon a right to feu-duties payable out of other lands, which had originally belonged to an abbay, and, after the reformation, had been erected into a temporal lordship. To this claim it was objected, that the vassals in these lands had taken the benefit of the acts of annexation, and held them immediately of the crown, and therefore were not vassals to the claimant, who, by his charter, had no other right than that of up-

lifting the feu-duties; and it was found that he had no title to be enrolled\*.

Royal boroughs, or even boroughs of regality or barony, may stand infest and possessed of lands holding of the king; they cannot, however, vote in the election of commissioners from shires in virtue of such lands, how high soever their extent or valuation may be. The whole strain of the statutes concerning such elections, which talk always of *freeholders*, or of *persons*, seems to exclude all bodies politic or incorporate. No freeholder can be admitted to act by proxy or delegation; but, without such power, a body corporate cannot possibly vote. Besides, the oaths which the law allows to be put to freeholders cannot be taken by delegates from such bodies. There is therefore no room for admitting them to a vote; and so it was found by the court of session, after a most deliberate consideration †.

Before

\* 17th January 1755, Campbell of Monzie *contra* Campbell of Ardkinglafs.

† 6th March 1760, Sir Michael Stewart *contra* borough of Paisley. This borough had long been in the use of voting

Before concluding this branch of the qualifications of a freeholder's title, it will be proper to take notice of an exception which has long prevailed, both with regard to the holding and valuation, and indeed does in a great measure prevail even at this day. We have seen that, by all the acts of the Scotch parliament, from the time of James I. downwards, none were allowed to vote, or to be elected, but those who held immediately of the king or prince, and that, when the old extent did not appear, it was necessary to show that the lands were of L. 400 of valued rent. But this notwithstanding, the vassals of subject-superiors in the shire

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of

ting by a delegate; and it even appeared, that their vote had been sustained in the Scotch parliament 1703, on occasion of a controverted election for the shire of Renfrew. The minute of parliament runs thus: 'Item, the objection against the town of Paisley, (that being a borough of barony, howbeit infest and in possession of a freehold, yet, since no burgeses could be a delegate for that end, therefore the incorporation could have no vote in the election of barons), was considered, and the house having acquiesced to sustain the vote, the objection was passed from by the party, and allowed to be withdrawn.'

of Sutherland were always in use, not only to vote, but even to be elected commissioners for that county, and that too without being possessed either of the ordinary extent or valuation required by law. There was indeed good reason for an indulgence in the first of these respects. All the lands within the shire held for a long time of the earls of Sutherland. There were no small barons within it who held of the crown. Of course, it could have had no representation, unless the earl's vassals had been allowed to usurp the privilege of freeholders.

Of this singularity no public notice was taken by the legislature before the act of the 16th of George II. so often mentioned, which, after setting forth, that, by the constitution of the shire of Sutherland, and by constant usage, the barons of that shire had been represented, not only by the immediate vassals of the king and prince, but also by those who held their lands of the earls of Sutherland, and other subject-superiors, and that such sub-vassals were in use to vote at elections, as well as the vassals of the king  
and



and prince, and without any restriction as to the *quota* of the old extent, or the valued rent of their lands, whereby votes had been unduly multiplied, and claimed by several persons, in respect of the superiority and property of the same lands, enacted, *1mo*, That, after the first of September 1745, no person should be capable to be elected a commissioner for that shire, or have right to vote at such elections, without being infest and in possession of lands, liable to his Majesty's supplies and other public burdens, at the rate of L. 200 Scots of valued rent. *2do*, That one person, and no more, should thenceforth be entitled to vote in respect of the same lands. *3tio*, That, where lands were held, by any baron or freeholder, immediately of the king or prince, such baron or freeholder, but not his vassals or sub-vassals, should be capable to be elected and vote. *4to*, That where lands were holden of the king or prince, by a peer or other person, or body politic or corporate, disabled by law to be elected a member of the house of commons, or to vote in such elections, the privilege should belong  
to

to the proprietor and owner of the lands; and that no alienation of the superiority, to be made by such peer or other person, or body politic, should deprive such proprietor and owner of his right to vote, or capacity to be elected, or entitle the purchaser to that privilege. And, 5<sup>to</sup>, That the property of lands of L. 200 Scots of valuation, holden in part immediately of the king or prince, and in part of a peer or other person, or body politic, incapable to elect or to be elected, should be a sufficient qualification to the proprietor and owner, any law or usage to the contrary notwithstanding. The freeholders were likewise ordered to make up a roll of their number, at the Michaelmas head-court 1745, and to revise the roll at their subsequent yearly Michaelmas meetings, and meetings for election, according to the rules prescribed by the acts of parliament, made for regulating the elections of commissioners for shires in Scotland, which were declared to extend to the shire of Sutherland, as well as to the other shires, except in so far as it was otherwise provided by this act of the  
16th

16th of George II. in the particulars above-mentioned.

The third qualification respecting the title is, that the claimant be infest in the property or superiority of the lands, on which he founds a right to vote.

The statute 1681, did not require, that a person should be infest for any length of time, before he could be enrolled or have a right to vote. Alterations have, however, been made in this respect by two British statutes.

By an act of the 12th of Queen Anne \*, it was declared, that, from and after the determination of the then parliament, no conveyance or right whatsoever, whereupon infestment was not taken, and the seifine registered one year before the test of the writs for calling a new parliament, or one year before the date of the warrant for making out a new writ for an election, during the continuance of a parliament, should entitle the person or persons so infest to vote, or to be elected at that election, in any shire or stewardry

\* Stat. 1, c. 6.

stewartry in Scotland. And, by the act of the 16th of George II. \*, it was enacted, that no purchaser or singular successor should be enrolled, till he was publicly infeft, and his seifine registered, or charter of confirmation was expedite, (where confirmation was necessary), one year before the enrolment.

The last of these two statutes does not expressly repeal the former. It was accordingly objected to a person, who claimed to be enrolled at a meeting for election, that he could not be admitted, because the date of the writ for calling the parliament was 9th April 1754, and his instrument of seifine was only registered 27th April 1753. The freeholders having rejected the claim, a complaint was preferred to the court of session by the claimant, in which he founded on the statute of George II. allowing those to be enrolled, whose seifines were registered one year before; and contended that, as *posteriora derogant prioribus*, the act of the 12th of the queen was in so far thereby repealed.

To

\* C. 11. § 10.

To this the freeholders answered, that the maxim, *posteriora derogant prioribus*, only takes place, where two things enacted by different statutes are incompatible; but that here they were not so; for the clause in the first act respected the right of voting and being elected, and the clause in the other respected only the privilege of being enrolled; and the freeholders would have enrolled the complainer at the meeting, after the election of the commissioner to parliament was over, if another objection had not stood in the way. But it being replied, that the act of the 16th of George II. by having only required that a person be infest a year before he be enrolled, and by having, at the same time, in other clauses, impowered every one to vote who is enrolled, must imply a repeal of that clause of the act of the 12th of Queen Anne, on which the objection was founded; the court of session ordered the claimant to be added to the roll \*.

The

\* 17th January 1755, Buchanan of Carbeth *contra* Cunningham of Ballendalloch.



The date of presenting feifines to the keeper of the register, and of his marking them in the minute-book, is reckoned the date of the registration, altho' they should not be actually inserted at length in the record, for some time after †.

An infeftment, though not registered till more than fixty days after it is taken, is effectual againft the granter and his heirs, but not againft fingular fucceffors. It may therefore be asked, If it ought to be fufained as a good title for enrolment? I believe the queftion has never occurred; but I think it would fall to be fufained. The ftatute only requires, that the feifine be registered a year before the enrolment; and where no other infeftment appears, it muft give a complete title to the lands. But if, in confequence of a fecond difpofition from the granter to a third party, a new infeftment fhould be taken and registered within fixty days, the firft difponee will then fall to be ftruck off the roll,

† 9th February 1768, Sir Alexander M<sup>c</sup>Kenzie, and others, *contra* M<sup>c</sup>Leod of Cadboll, and others.

roll, and the second will have a good title to be admitted upon it.

The freeholders have no right to call for the warrant of the charter, on which the infestment proceeds, nor to enter into a discussion of a claimant's progress, but the infestment itself must be perfectly formal, and every nullity that appears *ex facie* of the right is fatal to the freehold-qualification claimed upon it.

Sir John Gordon of Invergordon conveyed to Ross of Priesthill in liferent, and to Gordon of Carroll in fee, three different parcels of land, viz. *1mo*, A part of the lands of Easter Aird and Easter Tarbat. *2do*, A part of the lands of St Martin's. And, *3tio*, Four parcels of the lands and estate of Meikle Tarrell. But, in the instrument of seifine in favour of these gentlemen, the notary only mentioned their being infest in the lands of Easter Aird, Easter Tarbat, and St Martin's, neglecting to mention Meikle Tarrell: And an objection being made, that it did not appear that they were infest in the whole

whole of the lands contained in their claim, it was sustained by the court, though there was the strongest reason to believe, from the latter part of the instrument, that infeftment had actually been taken upon the whole, as it concluded with these words: ‘Acta erant  
 ‘haec super fundum omnium et singula-  
 ‘rum partium, seu portionum, praedictarum  
 ‘terrarum de Easter Aird, Easter Tarbat, et  
 ‘*Meikle Tarrell*, respective et successive\*,’ &c. It is a remarkable circumstance, that this objection, which did not occur to the parties, but was observed from the bench, had the consequence to determine the election for the county of Cromarty in favour of Mr Pulteney.

David Ogilvy was enrolled, as a freeholder of the county of Forfar, at Michaelmas 1767, upon the following titles: 1<sup>mo</sup>, Charter under the great seal, in favour of William Earl Panmure, of a number of different lands, and, amongst others, the lands of Auchmull. 2<sup>do</sup>, A conveyance of these lands of Auchmull to Mr Ogilvy in liferent,  
 and

\* 18th February 1768, M<sup>c</sup>Leod of Cadboll, &c. *contra* Rofs of Priesthill, &c.

and the earl in fee, and an assignment of the precept in the earl's charter, so far as it respected them. And, 3<sup>tio</sup>, An instrument of seifine upon that precept. Against this enrolment a complaint was preferred to the court of session by certain freeholders standing on the roll, who insisted that the seifine was null, as infeftment had not been taken upon the several different tenements of which the qualification was composed, although they lay discontiguous, but had only been taken at one part for the whole. To this it was answered, that Lord Panmure's charter contained a dispensing clause in the following words: 'Quod unica fasina per  
' dictum Willielmum Comitem Panmure, e-  
' jusque praedict. super aliqua parte fund.  
' dict. terrarum, nunc et omni tempore fu-  
' turo, per deliberationem terrae et lapidis  
' fundi earundem, absque ullo alio symbolo,  
' sufficiens erit pro integris terris, baroniis,  
' molendinis, decimis, piscationibus, aliisque  
' supra script. cum pertinen. vel quavis ea-  
' rundem parte, non obstan. quod discontigue  
' jacent.' The complainers admitted, that

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such

such dispensing clauses had been established by usage, and were effectual, so long as the whole lands granted by the charter remained vested in one person; but insisted, that, whenever the union was dissolved, by an alienation of a part, the dispensation was at an end, and that infeftment must therefore be taken upon each of the separated parcels, according to the common rules of law. Mr Ogilvy, in opposition to this, founded upon several instances, where, upon a partial sale of lands granted by charter from the crown, and, upon an assignation of the unexecuted precept contained in such charter, infeftment had been taken at one particular part for the whole, pursuant to the dispensation in the charter. These instances were, however, of a recent date; and the court sustained the objection\*; but their judgement was reversed in the house of lords†.

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\* 19th January 1768, George Skene and Charles Hunter *contra* David Ogilvy.

† 4th March 1768. The same judgements were severally pronounced in the court of session and house of lords, in thirteen other similar cases from the county of Forfar.



A stronger case occurred in the county of Linlithgow, where the infestment was taken, in virtue of a dispensing clause, at a place which was not even conveyed to the claimant, but to another person \*.

The title of one who claims to be enrolled as a proprietor of lands † must be ab-

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solute,

\* The case here referred to is that of David Dundas, Esq. This gentleman's claim being rejected by the freeholders, upon the objection made to his infestment, he complained to the court of session, who dismissed his complaint, 19th December 1767. After the judgement of the house of lords in the case of David Ogilvy, he applied to be enrolled at the meeting for election in April 1768, and was enrolled accordingly; but, in a complaint preferred to the court of session, upon the footing that their former decree was a *res judicata*, until reversed upon an appeal, the court found, 15th November 1768, 'That the former decree, sustaining the objection to Mr Dundas's being enrolled, was a *res judicata*, which barred the freeholders from proceeding to consider the claim presented by him to them upon the 16th of April last; and, therefore, granted warrant for expunging him from the roll.' Mr Dundas, upon this, appealed from both decrees, and both were reversed, 5th March 1770.

† By proprietor, I do not mean here to distinguish between one who has the full enjoyment of the lands in which he is infest, and one who has only the superiority.

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solute, and not dependent on the will of the person from whom it is derived. A revocable disposition is not sufficient, because it is inconsistent with the idea of the property being vested in the disponee; nor will a conveyance, containing a reserved power and faculty to the disponent to burden or alienate the lands, without the consent of the disponee, be sustained, even though such power or faculty be expressly renounced, unless such renunciation be recorded a year before the meeting at which the disponee claims to be enrolled\*. This is not expressly enacted by any statute, but is perfectly analogous to that clause of the act of the 16th of George II. which requires the registration of an absolute infeftment to be a year before the enrolment. It is the renunciation of the reserved powers or faculty that alone gives a title to the disponee

The word is here only used in contradistinction to those who have acquired temporary rights, as liferenters, or redeemable rights, as wadsetters.

\* 17th January 1755, Dundas of Manner *contra* Craig of Dalnair. 14th January 1761, Lauchlan Grant *contra* Alexander Hay younger of Cocklaw.

ponee to be admitted to the roll of freeholders, and, of course, such renunciation ought to be recorded as early as an infeftment upon an absolute and irredeemable conveyance.

It was however found, that an infeftment upon a disposition, which bore, that no debts contracted, or deeds done, or to be contracted or done by the disponee, during the life of the disponent, without his consent, should affect the lands, or the rents thereof, was a sufficient title for enrolment \*. In this case it was pleaded, that the claimant had in effect no estate at all during the life of the disponent: But it was answered, that he was in the absolute and irredeemable right of the lands: That the restrictive clause of the disposition could have no influence, as there was no express prohibition against selling, nor any declaration that the debts contracted by him should be void and null; and that, besides, it was common for persons to be

O 3                      admitted

\* 5th January 1762, Goldie of Southwick *contra* Gordon younger of Campbeltown.

admitted upon the roll who were fettered even with the strictest entails.

It has been made a question, whether an infestment, proceeding upon a disposition by an heir of entail who is strictly barred from the power of alienating the lands, can afford a title for enrolment; but it being answered to an objection made on that head, That a conveyance by an heir of entail, however strictly fettered, is good against every mortal but the substitutes in the entail, and that it was *jus tertii* to any third party to plead in their right; the court of session sustained the titles produced for the claimants, and ordered them to be added to the roll \*.

It is not necessary in order to get upon the roll of freeholders, that the claimant be infest as absolute proprietor of the estate upon which he claims; even a temporary right is sufficient, provided it does not depend upon the will of another.

Thus,

\* 5th February 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell.

Thus, the act 1681 allows the privilege of voting for a commissioner to parliament to persons infest in an estate for their own life; and the granting of liferent-rights is now become one of the ordinary methods of creating freehold-qualifications, when estates are split, for the purpose of increasing or supporting a political interest \*.

When lands are conveyed to one in liferent, and to another in fee, both fiar and liferenter are intitled to be enrolled; but the liferenter having the immediate interest, the fiar can only vote in his absence, or in the

O 4

event

\* Of this a recent example has been already taken notice of from the county of Forfar. It is common, especially in the southern part of the island, to purchase annuities, depending not upon the lives of the purchasers, but upon the lives of others. Supposing therefore a person should receive a conveyance to an estate in Scotland, not in liferent, but to remain with him during the life of a third party, and to return afterwards to the granter; *quaeritur*, Will such person be entitled to be admitted to the roll of freeholders? He has surely an equal right to the estate, during the life of the third party, with one to whom an estate is conveyed during his own life; but still he is neither fiar nor liferenter, and therefore I doubt much if he could be enrolled.



event of his declining to vote, if present at the meeting.

Husbands are, by the same statute, entitled to vote, in right of the freeholds belonging to their wives, though they have no interest in their own person. The wife must however be herself seised.

This statute allows the same privilege to the widowers of heiresses, who are entitled to vote in right of the courtesy, which is a life interest given, by the act of the law, of all the lands in which the wife died seised, as heir to her predecessors.

Appraisers or adjudgers, seised in lands of a proper extent or valuation, are also, by the same statute, entitled to be enrolled, and to vote in the election of a commissioner to parliament. This privilege, however, they enjoy not, during the course of the legal reversion, because, until it expires, their right is not absolute, but redeemable at any time, when it shall please the debtor to pay the accumulated sum in the adjudication, and the interest, and may therefore be said to be pendent upon his will; whereas, upon the expiration

piration of the time allowed him for that purpose, his right of redemption is foreclosed, and the legal transference made by the adjudication becomes absolute. But, where there are two or more adjudgers, they cannot all be enrolled, or vote upon the same lands, however large their old extent or valued rent may be. The old extent cannot now be split, neither can two persons vote upon an undivided *cumulo* valuation; they are each of them proprietors of the whole *pro indiviso*; the law, therefore, in such a case, allows the privilege of a vote only to the adjudger who is first inest; and, in doing so, it even favours adjudgers more than voluntary disponees *pro indiviso*, none of whom can be enrolled till they obtain a division, how great soever the estate conveyed to them in common may be. No adjudger can however be enrolled, even after the expiration of the legal, unless he be in the possession of the lands; and, until that happen, the debtor is entitled to continue upon the roll\*.

Proper

\* See 7th June 1748, Home-Campbell and Ker, *contra* Home of Manderston.

Proper wadsetters of lands, of the holding and extent, or valuation required by law, are, in like manner, entitled to vote as freeholders, because, until the term of redemption come, they have the full enjoyment of the lands, as much as if they were absolute proprietors, and their right is nowise pendent on the will of the reverser. Improper wadsetters, on the other hand, are excluded, because they cannot be considered in the light of proprietors, even before the term of redemption. They are not entitled to the full rents and profits of the lands. They are bound to account for the surplus, after payment of their interest, or, which is the same thing, to impute it in extinction of their principal. Their situation is little better than that of those who have got heritable bonds or infeftments, for payment or security of money, and who are expressly excluded by the statute.

After the term of redemption is come, proper wadsetters are upon a similar footing with adjudgers, prior to the expiration of the legal, in this respect, that the lands may be redeemed.

redeemed by the reverser, at any subsequent term. Their right from that time is entirely pendent on his will. It may therefore be thought, that such wadsetters ought not to be admitted upon the roll, or, if formerly enrolled, ought then to be struck off. But as, in every question of this nature, the words of the statutes must be the governing rule, I apprehend, that the act 1681 would be found adverse to such a plea; for it is thereby expressly enacted, that the rights to vote proceeding upon expired comprisings, adjudications, or proper wadsets, shall not be questionable, upon pretence of any order of redemption, payment, and satisfaction, unless a decret of declarator, or voluntary redemption, renunciation, or resignation, be produced.

It was objected to a person, claiming to be enrolled as a wadsetter, that his title was a redeemable right, and not a proper wadsett, because it contained no clause empowering him to call for his money. But this objection was justly over-ruled. Such clauses are not essentially necessary to the constitution

tion of wadsetts, and seem to be but a modern invention. Of old, wadsetters generally got too beneficial bargains to think of parting with the possession, and calling back their money; and Craig, who, in his treatise *De Feudis*, wrote a whole title upon the subject of wadsets, takes no notice of a clause of that sort. Besides, the want of such a clause takes a wadset still more out of the case of a *jus crediti*, and it is owing to its being considered in the light of a *jus dominii*, that it gives right to a vote\*.

A wadset of the bare superiority of some lands, and of the full property of other lands, yielding a small rent, by which the wadsetter took the hazard both of the feuduty and of the rent, was held a proper wadset, and, as such, considered to constitute a freehold-qualification; although it was objected, that, by the contract, the reverser was to have the benefit of the casualties of superiority, which might happen to fall due before

\* 17th January 1755, Galbraith *contra* Cunningham. See also 18th July 1745, Freeholders of Roxshire *contra* Munro of Culcairn.



fore the redemption \*. The chief answer made to this objection was, that casualties of superiority are not the fruits of the lands, or a proper subject to be relied on for the payment of interest of money; that the wadsetter trusted to the rents and feu-duties for payment of his interest; that, as he gave no consideration for the chance of casualties, it was but reasonable that he should account for them when they fell due; but still he was not on that account the less proprietor of the lands; and that, in like manner, a superior may agree to gift or discharge the casualties, and yet remain superior, and be entitled, as such, to vote. It might also have been observed, that a vote upon a superiority had been sustained, although the superior had discharged the feu-duty for ever. So it was found, 30th July 1746, freeholders of Dumfries-shire *contra* Ferguson of Craigdarroch.

A wadset of a superiority, where the feu-duty was precisely equal to the interest of  
the

\* 6th March 1754, Campbell of Succoth *contra* Stirling of Herbertshire.

the redemption-money, was likewise found a proper wadset, so as to entitle to a vote\*.

It has been already mentioned, that a husband is entitled to vote in right of his wife's freehold. But that privilege does not extend to every kind of freehold-qualification. By the act 12mo Annae † it was expressly provided, ' That no husbands shall  
' vote, at any ensuing election, by virtue of  
' their wives infeftments, who are not heirs,  
' effes, or have not right to the property of  
' the lands on account whereof such vote  
' shall be claimed.' This, I apprehend, will not bar a husband from voting upon a wadset-right, in consequence of which his wife is infeft; but then it must be a wadset of property, not of a bare superiority, which, in no case, gives the husband a vote.

Wadsetters cease to have a right to vote, and may of consequence be struck off the roll, how soon a declarator of redemption, or a voluntary resignation, or even renunciation

\* 22d February 1760, Grant of Drumphad, &c. *contra* Campbell, &c.

† Cap. 6. § ult.

ciation, is obtained by the reverser ; but as, by the wadsetter's infestment, the reverser is divested of all right to the lands, other than the power of redemption, it is a question of some difficulty, whether a simple renunciation by the wadsetter will so far restore the reverser to his right, as to entitle him to be admitted upon the roll of freeholders ? As the law formerly stood, a superior was not bound to receive the reverser again as his vassal, even though the wadsetter had granted a disposition and procuratory of resignation in his favour. For obviating this inconveniency, it was customary to obtain letters of regrefs from the superior, by which he bound himself to give the reverser access to the property, upon his redeeming the lands. That, however, is now unnecessary ; the act of the 20th of George II. cap. 50. obliging all superiors, upon getting payment of the composition due to them on such occasions, to receive any one as their vassal, who produces a grant by the former vassal, containing a procuratory of resignation. But still the difficulty remains, viz. whether a  
bare

bare renunciation, without a resignation in the hands of the superior, and a new charter and infeftment following upon such resignation, can have the effect to restore the reverfer to his former right? According to the nice notions of the feudal law, it cannot, and, of consequence, should not, entitle him to be admitted upon the freeholders roll; but, as the strict feudal rules have of late rather been slighted in questions of enrolment, I doubt not, but that a simple renunciation will be sustained, if ever the point comes to be thoroughly canvassed. A wadset, though seemingly a right of property, is in reality only a consideration for the use of money; and, viewing it in that light, it may perhaps be thought more consistent with justice and equity, that, after a renunciation, the reverfer should have the full benefit of his property \*. I should, however, imagine, that in that, case, it would be necessary for the renunciation to be recorded a year

\* This question occurred in 1767, in the case of Sir George Lockhart, but was not determined.

year before the reverfer could claim to be enrolled. Were he to take the more formal method of reinvesting himself, by obtaining a new charter upon the resignation of the wadsetter, he could not be enrolled till a year after the registration of his infeftment upon such charter; and it would surely be absurd to suppose, that a bare renunciation should have a stronger effect.

Although I have classed infeftment as one of the essential qualifications respecting the title, yet it is not always necessary that the person who claims the right to vote be himself infeft. We have already seen one instance of this in the case of husbands, who are entitled to vote in virtue of their wives infeftments. Another occurs in the case of apparent heirs, who, by the statute 1681, are allowed the same privilege, if they are in possession, by virtue of their predecessors infeftment, of the holding, extent, and valuation required by law.

This act has not distinguished, whether the predecessor stood himself on the roll or not; nor is there any thing said upon that

P

head



head in the act of the 16th of George II. If the predecessor actually stood upon the roll, there can be no doubt that the apparent heir is immediately entitled to be admitted to it, upon producing his predecessors infestment, and shewing that it affords a sufficient qualification \*. But what if the predecessor had not been enrolled? I would distinguish in that case. If he was infest, and his seisin was registered a year before his death, the heir may properly claim to be enrolled upon his apparenacy, because his predecessor had a right to be enrolled himself; but, if he died before the expiration of a year after the registration of his infestment, I incline to think, that the apparent heir can have no right to be admitted to the roll, until at least that year is expired; for it surely never

\* Of this the freeholders must be satisfied. A person who is erroneously enrolled must continue upon the roll for life, unless a complaint is brought within four calendar months, or an alteration happen in the circumstances of his title, to authorise his being struck off; but the freeholders are under no obligation to give his successor a right to vote upon the same improper titles.

ver could be the intention of the legislature, to put apparent heirs upon a better footing than their predecessors who were actually infest.

A person claiming right to the estate of his grandfather, by the mother's side, cannot be enrolled with propriety, until he be actually served heir; because it is in law presumed, that there is an heir-male, until the contrary be proved by a service; but there is no necessity for his being infest, in consequence of the service, which is only required as evidence that he is apparent heir.

An apparent heir was found entitled to be enrolled, although his predecessor had executed a disposition of the lands, with a procuratory and precept in favour of a third party, the disponent having granted an obligation not to become the crown's vassal, by taking infestment on the procuratory, or obtaining a charter of confirmation during the apparent heir's life\*. But, if the predecessor's right was revocable, and merely no-

P 2

minal,

\* 5th March 1755, Murray *contra* Neilson.

minal, the granting a discharge of the power of revocation to the heir will not entitle him to be enrolled upon his apparenacy\*. The apparent heir can only be enrolled as such, upon a title that would have been a good qualification in the predecessor; but the predecessor could not be enrolled upon a revocable disposition; and the discharge was a new title granted to the heir himself.

It is no objection to an heir's being immediately enrolled, that he has made up titles in his own person†. The privilege is not given to them because they are in a state of apparenacy, but because it is reasonable, that, upon the death of their predecessors, they should have the same right to vote which their predecessor enjoyed, although they have not completed their feudal titles. It would therefore be absurd to put them in a worse footing, on account of their having made up such titles, by postponing their enrolment till a year after the registration of their infeftments.

Husbands

\* 3d July 1753, Abercrombie *contra* Gordon.

† 17th January 1755, Galbreath *contra* Cunningham.

Husbands cannot vote upon the apparen-  
cy of their wives. They are only entitled  
to that privilege when the wife is infest \*.  
But it is not necessary for the husband to  
wait a year after her infestment before he  
can be enrolled.

It may be asked, Whether one who wants  
to be enrolled as an apparent heir, must  
lodge a claim with the sheriff-clerk two ca-  
lendar months before the Michaelmas meet-  
ing? That precise point has never been de-  
cided; but, from a judgement pronounced  
in a very late case, it appears to have been  
the opinion of the court of session, that a  
claim was necessary. In that case, an appa-  
rent heir had actually lodged a claim, and  
was accordingly enrolled; and a complaint  
having been preferred to the court of session,  
setting forth, that the claim was defective,  
in so far as it neither mentioned the dates of  
the predecessor's titles, nor the particular  
lands upon which the claimant desired to be  
enrolled, nor their extent or valuation, the

P 3

court

\* 12mo Annae, cap. 6. § ult. 19th January 1745,  
freeholders of Lanark *contra* Hamilton of Wilshaw.

court sustained the objection, and ordered him to be struck off the roll \*. But, if a claim had been unnecessary, it must have been a matter of no consequence that the apparent heir had lodged one that was defective. Indeed, the words of the act are very general, and make no exception with regard to apparent heirs, more than others who apply to be admitted on the roll.

When it is in view to establish a freehold-qualification upon a bare superiority, the claimant must be able to show that he has a proper feudal vassal in the lands. It has accordingly been found, that a disposition of lands, containing an assignation to a charter, but reserving the property, or *dominium utile*, to the granter of such disposition, does not afford a title for enrolment †. A subaltern holding cannot be established in that manner by a simple reservation; and, when a person intends to part with the superiority of his lands, in order to give a freehold-qualification

\*  
bernethy of Mayen.

1773, Mr Cosmo Gordon *contra* A-

†  
ver.

1759, Elliot *contra* Schaw and Oli-



fication to another, the best method is to separate the property from the superiority before hand, by granting a feu-right to a third party, and then to execute a disposition to the person who is to get the superiority, with an exception of that feu-right from the warrandice, after which the disposer needs only a reconveyance from the third party, to whom the feu was granted, to vest the property, or *dominium utile*, in his own person.

The last qualification, so far as relates to the title, is, That the claimant be actually in possession of the lands. This is a most salutary regulation, to prevent fictitious freeholds from being reared upon simulate titles, in persons who have no real interest in the estate in virtue of which they claim a right to vote; and, in order to carry it into execution, the utmost attention, on the part of the legislature, has been requisite.

The act of the 12th of Queen Anne, cap. 6. after observing, that, of late, several conveyances of estates had been made in trust, or redeemable for elusory sums, nowise ade-

quate to the true value of the lands, on purpose to create and multiply votes, contrary to the true intent and meaning of the laws in that behalf, did therefore, *inter alia*, enact, That, from and after the determination of the then parliament, it should be lawful to any of the electors present at a meeting for election, who suspected any persons to hold their estates in trust, and for the behoof of another, to require the preses of the meeting to put to such persons the following oath, and that those who refused to swear and subscribe such oath should be incapable of voting, or being elected at that meeting. The oath runs thus: ‘ I A. B. do, in the presence  
‘ of God, declare and swear, That the lands  
‘ and estate of for  
‘ which I claim to give my vote in this election, are not conveyed to me in trust, or  
‘ for the behoof of any other person whatsoever; and I do swear before God, That  
‘ neither I, nor any person to my knowledge,  
‘ in my name, or by my allowance, hath  
‘ given, or intends to give, any promise, obligation, bond, back-bond, or other security,  
‘ ty,

‘ty, for re-disponing or re-conveying the  
‘said lands and estate any manner of way  
‘whatsoever. And this is the truth, as I  
‘shall answer to God.’

This oath not being thought sufficiently  
comprehensive to guard against the evil the  
legislature had it in view to prevent, the fol-  
lowing was substituted in its place, by an act  
of the 7th of George II. cap. 16.: ‘I A. B.  
‘do, in the presence of God, declare and  
‘swear, That the lands and estate of  
‘                   for which I claim a right to  
‘vote, in the election of a member to serve  
‘in parliament for this county or stewartry,  
‘is actually in my possession, and do really  
‘and truly belong to me, and is my own  
‘proper estate, and is not conveyed to me in  
‘trust, or for or in behalf of any other per-  
‘son whatsoever; and that neither I, nor  
‘any person to my knowledge, in my name,  
‘or on my account, or by my allowance,  
‘hath given, or intends to give, any pro-  
‘mise, obligation, bond, back-bond, or other  
‘security whatsoever, other than appears  
‘from the tenor and contents of the title up-  
‘on

‘ on which I now claim a right to vote, di-  
‘ rectly or indirectly, for re-disponing and  
‘ re-conveying the said lands and estate, in  
‘ any manner of way whatsoever, or for  
‘ making the rents or profits thereof forth-  
‘ coming to the use or benefit of the person  
‘ from whom I have acquired the said estate,  
‘ or any other person whatsoever; and that my  
‘ title to the said lands and estate is not no-  
‘ minal or fictitious, created or reserved in  
‘ me, in order to enable me to vote for a  
‘ member to serve in parliament; but that  
‘ the same is a true and real estate in me, for  
‘ my own use and benefit, and for the use  
‘ of no other person whatsoever. And that  
‘ is the truth, as I shall answer to God.’

This statute appoints the above oath to be taken, when required, at any meeting of the freeholders, whether for election, or for adjusting the rolls; and, if any refuse to take it, they are not only deprived of the privilege of voting or of being elected at that particular meeting where it is tendered to them, but their names are likewise ordered to be e-  
razed

razed out of the roll of freeholders \*. The act also further declares, that, if any person shall presume, wilfully and falsely, to swear and subscribe this oath, and shall be lawfully convicted thereof, he shall incur the pains and punishment of perjury, and be prosecuted for the same according to the laws and forms in use in Scotland.

The same act appoints, that every freeholder, before he is either enrolled or admitted to vote at any election, or meeting for enrolment, in any question for the choice of a preses or clerk, or other question whatsoever, shall be obliged (if required by any other freeholder present) to take and subscribe the oaths appointed by law to be taken by electors of members to serve in parliament, when required so to do; which oaths the preses or clerk of the meeting is thereby impowered and required to administer. It has been made a question, Whether this part of the statute, allowing oaths to be put  
before

\* § 3.



before the election of preses and clerk, relates solely to the oaths to government? Or, Whether it likewise comprehends the oath of trust or possession, first introduced by the 12th of Queen Anne, and amended by this same act of George II.? The point came to be tried very lately, in the course of certain complaints from the shire of Murray, where this oath was tendered and refused to be taken before the election of preses and clerk at the Michaelmas meeting 1772. The court of session found, that the oath was lawfully tendered at that meeting\*. But the house of lords reversed the decree, and found that it could not be put†.

The

\* February 1773, Archibald Duff *contra* Sir Ludovick Grant, &c.

† 31st March 1773. This surely merits the attention of the legislature. It often happens that the party who carries the question in the choice of the preses, does of course carry the election. And it seems unjust that those who cannot directly vote in the election of a member, without taking the trust-oath, may indirectly do so by voting for a preses, whose decision or casting vote may give the election in favour of the person whose interest they want to support.

The words “ Nominal or fictitious, created or reserved in order to enable to vote for a member to serve in parliament,” have been productive of many questions; and the court of session, from a laudable anxiety to carry into execution what appeared to them to be the views of the legislature, have perhaps gone further of late than, as mere interpreters of statutes, they had authority to do.

The first instance I find of the objection of nominal and fictitious being stated against a title, occurred in 1745, in the case of Burnet of Crigie. This gentleman received a disposition of certain lands from his father, to whom he afterwards conveyed them to hold blanch of himself. The freeholders objected, that he had no real estate, and that his title was fictitious and nominal, and created on purpose to make a vote. But it being answered, that a superiority was a good title, and that the son's interest, of however little value soever it might be, was real, and not held for the behoof of any other person,  
the

the court of session repelled the objection\*. But the question being again brought under consideration by a reclaiming petition, in which it was chiefly urged, that it behoved the claimer of a vote to swear that he had not made any disposition of the lands or rent, other than appeared from the contents of the rights under which he claimed; the court altered their former interlocutor, and sustained the objection†.

In 1755, it was objected to the titles produced for three several claimants, that they were nominal and fictitious, because the dispositions upon which their charters proceeded contained a proviso, that, so soon as they had compleated their titles to the lands as immediate vassals of the crown, they should re-convey the property thereof to be held feu of themselves for a small feu-duty; and that the casualties of superiority should be taxed to small elusory sums. But, as in this case there was no obligation upon these claimants,

\* 30th July 1745, the freeholders of Kincardineshire *contra* Burnet of Crigie.

† 19th June 1746.

ants, other than what appeared from their own titles, the court repelled the objection\*.

In 1757, the Earl of Glencairn conveyed the superiority of certain lands to Mr Porterfield, who was his vassal in these lands. Mr Porterfield expedite a charter upon the procuratory in this disposition, and, without taking infeftment in his own name, immediately conveyed two parcels of the lands to two of the Earl's nephews in liferent, and to the Earl himself in fee. These two liferenters being infeft, and having claimed to be enrolled, it was objected, that their titles were plainly nominal and fictitious: But it being answered, that each of them had a true and real estate; that they were under no promise or back-bond, and held these superiorities in trust for no person whatever; and that it is no objection to a claimant that his chief view, in purchasing the right under which he claims, was to entitle him to the valuable privilege of voting for a member to serve

\* 9th January 1755, Forrester of Dunnovan, &c. *contra* Fletcher of Salton, &c.

serve in parliament, unless it can likewise be proved that his right is nominal and fictitious, i. e. not a real estate in himself, but held in trust for some other person; the court repelled the objection \*. A similar judgement

\* 5th February 1760, Campbell of Shawfield and Graham of Gartmore *contra* Muir of Caldwell. Those who do not consider the view of the legislature, in introducing the oath of trust, and take every part of it separately, are apt to think that no man can subscribe it with a safe conscience, who purchases a superiority for the sole purpose of entitling him to a vote in the election of a member to serve in parliament. They are, however, too scrupulous. From the preamble of the act of Queen Anne, we may plainly perceive, that no more was intended than to put a check to the practice of giving estates in trust, or redeemable for elusory sums, on purpose to create and multiply votes; and, although the oath prescribed by the act of the 7th of George II. is more minute and particular, we have no reason to think that any thing further was thereby intended. It is not to be supposed that the legislature could have it in view, to prevent people from purchasing superiorities for the purpose of acquiring freehold-qualifications; all they intended was, to restrain the creating of nominal and fictitious estates for that purpose; and the conclusion of the oath, which gives a description of a good qualification, in opposition to one that was thereby meant to be reprobated, shows that no more is requisite than that the estate, such as it is, be a true and real estate  
in



ment was pronounced in the course of the same month \*, in the case of Grant of Drumphad, where it was insisted, that, from the very manner in which the titles were made up, it was plain that the claimant had acquired the subject, not for his own behoof, but to serve his author; and that, as the law reprobated all such nominal votes; so, if the court was satisfied, from the face of the deeds, and the nature of the transaction, that the claimant's titles fell under that description, it was the same thing as if he had acknowledged, upon oath, that his qualification was nominal and fictitious. A still stronger case occurred in 1761 †; but, tho' it was observed from the bench, that the title conveyed no real interest in land, the claimant being only entitled to receive from his vassal one penny Scots of blench-duty year-

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in the freeholder, for his own use and benefit, and for the use of no other person whatsoever. The decision here quoted does therefore give a just interpretation of that oath.

\* 22d February 1760.

† 28th July 1761, Mr Walter Stewart, &c. *contra* Mr David Dalrymple.

ly, yet, as it had been decided, in other cases, that no regard was to be paid to the value of the estate, provided the claimant was really and truly vested in the right, such as it was, the court repelled the objection.

But, in the course of the questions that arose, with regard to the freehold-qualifications made up in the view of the last general election, the court of session took a very different turn. Founding upon the words of the trust-oath above taken notice of, viz. that the title to the estate on which the freehold is claimed is not nominal or fictitious, created or reserved, in order to enable to vote for a member of parliament, they laid hold of every circumstance, either arising from the face of the title-deeds, or from the acknowledgement of parties, which tended in the least degree to show, that the rights of the claimants had not been executed with a view to grant them a real estate for their own use and benefit, but merely in order to enable them to vote; and, upon that footing, they not only dismissed the complaints of many whom the freeholders had refused to admit  
upon

upon the roll, tho' on other grounds, but also ordered a number of others to be struck off, who had been actually enrolled, without any such objection being moved against them in the meeting of the freeholders. And altho' complaints, which had been brought against the enrolment of some of those persons, upon other grounds, had been dismissed by interlocutors that were suffered to become final; yet, where no decree was extracted, they considered them as still in dependence, and, upon a wakening of such of them as were sleeping \*, allowed the objection to be received. Nay, further, they even ordered those who had taken the trust-oath in the meetings of the freeholders, to answer interrogatories, for the purpose of discovering whether their qualifications were nominal and fictitious, or created on purpose to enable them to vote; and, upon their refusing

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to

\* A suit before the court of session is said to be sleeping, when no step of judicial procedure has been taken in it for a twelvemonth; after which, it cannot again be proceeded in without executing a summons of wakening, or revivor.

to answer, held them as confessed, and ordered them to be struck off the roll.

To mention all the cases of this kind that were determined by the court of session would fill a large volume. The most common method of giving freehold-qualifications, then practised, was, by grants of liferents or wadsets; and it will suffice to give an instance from each.

David Wallace, merchant in Aberbrothock, claimed to be enrolled at the Michaelmas meeting of freeholders of the county of Forfar held in 1767, as being interested in the liferent of the superiority of certain lands, in consequence of a conveyance from the Earl Panmure, and an assignment to the precept of seifine in the Earl's charter from the crown, so far as it related to these lands. The feu-duties payable by the vassal (the Earl's brother) amounted only to sixpence two-thirds yearly; and it having been required, by some of the freeholders present at the meeting, that this claimant should take the trust-oath prescribed by the act of the 7th of George II. he complied with

with that request, and was thereupon enrolled. Against this enrolment a complaint was preferred, in the course of which it was objected, that the claimant's qualification was nominal and fictitious, and, for proof thereof, the complainers referred to his own oath the following particulars: *1mo*, That it had been transacted between him and Lord Panmure, that he should accept of the liferent, for the single purpose of creating a vote, in order to support his Lordship's interest at the election. *2do*, That at, or soon after, obtaining the conveyance from the Earl Panmure, he had granted a back-bond, misfivive, or some other security in writing, obliging himself to denude in his Lordship's favour when required. *3tio*, That he paid no value for the conveyance granted to him. *4to*, That he received no revenue or profit of any kind, in consequence of that conveyance. *5to*, That it had been made out at the expence of Earl Panmure, the granter; that the claimant neither had bestowed, nor intended to bestow any expence, in order to render it effectual; that the titles never had



been so much as delivered to him ; and that he took no concern in the complaint then depending against him. And, *6to*, That he understood himself to be bound in conscience, and as an honest man, to denude in Lord Panmure's favour, at any time his Lordship should ask it of him.

Mr Wallace objected, That, having taken the oath which the law had appointed as the test of a nominal and fictitious qualification, no other oath could now be put to him, or other mode of investigation followed, nor could he be afterwards bound to answer interrogatories, in consequence of which he might be indicted for perjury ; and that the court of session, being only a court of review in questions of enrolment, they could not take under their consideration evidence which had not been laid before the freeholders, and far less administer any oath which the freeholders could not administer. To this it was answered, That although, by the oath prescribed in the act of George II. a new and summary method of discovering fictitious qualifications, without the necessity  
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of resorting to tedious and expensive proceedings at law, was introduced, yet the statute did not mean to enact, that it should be the only mode of investigation, or to take away the rules of proceeding by special interrogatories; that it could not be considered as an oath of reference to a party, but was an oath merely of opinion, and, therefore, no answer that might be made to the interrogatories could ever infer the crime or penalties of perjury; that, although it might be doubted how far the freeholders, whose powers were derived from particular and express statutes, could put such special interrogatories; yet, as it was clearly the intention of the legislature to put an end to all nominal and fictitious qualifications, so, whenever the powers given to inferior courts were defective, it was necessary to have recourse to the court of session, whose jurisdiction was ample and extensive; and that the questions proposed to be put tended to fix certain positions in law, of which that court were the only judges.

The court found it competent to put the oath; and Mr Wallace having declined to answer, they held him as confessed upon the points referred to him; and found that the estate upon which he had been enrolled was not a real estate in his person, for his own use and benefit, but that his rights thereto were nominal and fictitious, created in order to entitle him to vote at the ensuing election; and, therefore, ordered his name to be struck out of the roll \*.

Mr Ross of Inverchally was enrolled as a freeholder of the county of Cromarty, at the Michaelmas meeting 1766, upon a wadset of a superiority that entitled him only to a feu-duty of L. 5 : 10 : 0 Scots, and was redeemable at Whitfunday 1769, upon payment of L. 180 Scots.

A complaint was preferred against this enrolment; and, after certain objections had been over-ruled, it was pleaded, that Mr Ross's title was altogether nominal and fictitious

\* 9th March 1768, George Skene, and others, *contra* David Wallace.

titious in the construction of law; and, in evidence of this objection, the following facts were offered to be proved by his oath. *1mo*, That he was solicited by Mr Pultney (one of the candidates) to accept of the wadset, in order to create to him a freehold-qualification, and that, as the sole purpose of his accepting it was, to enable him to vote for that gentleman at the ensuing election, so he understood that it was only given with that view. *2do*, That he had no previous treaty with M<sup>r</sup> Leod of Cadboll, (the granter of the wadset), either with respect to the particular lands to be wadsetted to him, or with regard to the wadset-sum or the term of redemption. *3tio*, That he neither paid nor gave security for the wadset-sum; or, if any security had been granted, it was previously concerted, or at least he was made to understand, that no demand was to be made upon him, either for principal or interest, and that, upon his renouncing the wadset, such security would be delivered up. *4to*, That the expence of making out the conveyance, and expediting and recording his infestment, was defrayed

defrayed by Mr Pultney, or others by his orders, and that these rights never were delivered to Mr Rofs. And, *lastly*, That the expence of defending against the complaint was likewise defrayed by Mr Pultney, by whose agent and doers the whole was managed, and that Mr Rofs neither had paid, nor considered himself as liable in payment of any part of that expence.

It was also further objected, that Mr Rofs's title could not be considered as a wadset: That a wadset was defined to be 'a right, by which lands or other heritable subjects were impignorated by the proprietor to his creditor, in security of his debt;' that this description would not apply, where no money was advanced at the time of receiving the right, as, in that case, there could be no impignoration; and, therefore, laying the objection of nominal and fictitious out of the question, there was here a separate objection, that Mr Rofs was not a proper wadsetter in terms of the act 1681.

Mr Rofs was appointed to depose upon the facts referred to his oath, but declined  
to



to do so; upon which the court pronounced an interlocutor similar to that in the case of Wallace above mentioned.

I have chosen to give these two instances out of many similar ones, because both judgments were appealed from, and reversed in the house of lords \*; and the reader may have an opportunity of looking into the printed cases. It is not to be supposed, that the court of session will again follow the same mode of procedure; and, therefore, until some new regulation be introduced by the legislature, there can be no check against nominal and fictitious qualifications, created or reserved to serve a particular purpose, other than the oath prescribed by the statute of the 7th of George II. which must be put upon

\* 9th May 1770. Another reversal took place the same day, in the case of John Johnston, Esq; who, after answering special interrogatories put to him by the court of session, was ordered to be struck off the roll, the court having found it proved, that his estate was not a real estate in his person, for his own use and benefit, but that his rights and titles thereto were nominal and fictitious, created in order to enable him to vote at the ensuing election.

on the request of any freeholder present, either at a Michaelmas meeting, or a meeting for election.

### S E C T I O N III.

*Of certain Circumstances independent of the Title, which disable Persons from being admitted upon the Roll of Freeholders, or from voting in the Election of Commissioners from Shires.*

**H**AVING stated the qualifications required by law to entitle a person to be admitted to the freeholders roll, so far as respects the title upon which the claim for enrolment is entered; I shall next consider, whether there are any other requisites, and what circumstances will disable those who are infest and in possession of lands of forty shillings of old extent, or L. 400 of valued rent, holding of the king or prince, from being put upon the roll, or from the privilege of voting, although already admitted to it.

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In the first place, it is necessary, that those who claim to be admitted to the roll be of full age. Minority is mentioned in the act 1681, as a sufficient objection to a person's voting in an election; and, by the statute 1707, c. 8. it is further provided, that none shall be capable to elect, or be elected, but such as are 21 years of age complete. Neither of these statutes do, however, expressly prohibit a minor from being enrolled. Hence, at the Michaelmas meeting of freeholders of the county of Cromarty held in 1765, Mr Gordon of Newhall, who wanted a few months of 21 years, was enrolled under a proviso, that he should not be entitled to vote in any question, until he should be of perfect age. But, upon a complaint to the court of session, he was ordered to be struck off the roll, although he had in the mean time become of age, before the complaint was determined \*.

I formerly observed, that a person who  
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\* December 1765, M<sup>r</sup> Leod of Cadboll *contra* Gordon of Newhall.

was under tutory or guardianship as fatuous, could not be entitled to vote in the election of a peer; and, for the same reason, it may be concluded, that persons in that unhappy situation cannot be enrolled as freeholders. I see no reason, however, why one who is under an interdiction, either legal or voluntary, should be excluded from that privilege; and though, by a special statute, those who have obtained protections from the diligence of creditors are excluded, during the currency of such protections, from voting in the election of a member of parliament, there is no such enactment against persons who are interdicted.

Papists are also expressly excluded from the right of voting, and therefore ought not to be admitted to the roll; and, if any person who stands upon it, and is suspected of Popery, shall refuse to take the formula prescribed by the act of King William, and above inserted, he thereby becomes incapable to elect, or be elected \*.

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\* 1707, c. 8. I doubt, however, if the freeholders can turn a person off the roll, upon his refusing to take the formula.

The eldest sons of peers, though infest in lands holding of the crown of the extent and valuation required by law, are likewise incapable of electing, or being elected. For this we have no statutory enactment of the legislature, but it is perfectly consistent with the constitution of the old Scotch parliament. Being heirs to their fathers honours and dignities, they were not looked upon as commoners; and, in antient times, they were even allowed to sit and vote as proxies for absent peers\*; and as the act 1707, cap. 8. declared, that none should be capable to elect, or be elected as representatives, either of shires or boroughs in Scotland, but those  
who

formula. No such power is given them by the statute; and it may be thought sufficient, that this test of his religious profession can be put to him every time he attends, and claims to vote. He who refuses to take the oath of abjuration, is disabled from voting at that meeting where it is tendered to him, but he cannot on that account be struck off the roll. A different rule, indeed, takes place, when one refuses to take the trust-oath, prescribed by the act of the 7th of George II. and with reason too; because such refusal clearly implies an acknowledgement of a defect in his title.

\* Spottiswood's Law of Elections, p. 26.



who were entitled to that privilege by the laws and constitution of Scotland, they were thereby effectually debarred from having any voice in the election of the forty-five commoners to be returned from that part of the united kingdom to the British parliament; and a declaration to that purpose was accordingly made, by a resolution of the house of commons in the parliament of Great Britain held in the year 1708 \*. They may

\* Two resolutions of the Scotch parliament, upon this head, are extant in the records. The first is as follows: 'Edinburgh, the 23d of April 1685. In respect the Viscount of Tarbat's eldest son was elected one of the commissioners for the shire of Ross, by reason that his father is nobilitate, cannot now represent that shire as one of their commissioners, warrant was given to the freeholders of that shire to meet and elect another person in his place.' The other respected a borough; and is thus expressed: 'Edinburgh, 18th March 1689. The meeting of the estates having heard the report of the committee for elections, bearing, That, in the controverted election for the borough of Linlithgow, in favour of the Lord Livingstone and William Higgins, it is the opinion of the committee, that William Higgins's commission ought to be preferred, first, in regard of the Lord Livingstone's incapacity to represent a borough, being the eldest son of a peer; secondly, in respect William Higgins was more  
legally

may, however, be elected from any county or borough in England, no such prohibition

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having

‘legally and formally elected, by the plurality of votes of the burgeses; they have approven, and approves the said report in both heads thereof, and interpones their authority thereto.’ At the general election for the parliament held in 1708, peers eldest sons were returned from several shires and boroughs in Scotland. Against these returns petitions were preferred to the house of commons; and, in a petition from a number of the freeholders of the county of Aberdeen, for which Lord Haddo, the eldest son of the Earl of Aberdeen, had been elected, it was strongly urged, that the allowing a precedent of that kind would not only render the freeholders subservient to the nobility, but would likewise sensibly affect the very being and constitution of a British house of commons, by bringing the representation for Scotland into the hands of a numerous and powerful peerage. These petitions being taken under the consideration of the house of commons, and a motion being made, and the question being put, ‘That the eldest sons of the peers of Scotland were capable, by the laws of Scotland at the time of the union, to elect, or be elected, as commissioners for shires or boroughs to the parliament of Scotland; and, therefore, by the treaty of union, are capable to elect, or be elected, to represent any shire or borough in Scotland, to sit in the house of commons of Great Britain;’ it passed in the negative. See Journals of the House of Commons, ‘Veneris 3<sup>o</sup> die Decembris, anno 7<sup>o</sup> Annae Reginae, 1708.’ And, for a more particular account of the debate, see Scott’s History of Scotland, page 746.

having ever taken place in that part of the united kingdom. Irish peers may likewise be members of the house of commons, in the British parliament, and may represent any county or borough in Great Britain, if possessed of the necessary qualifications; for, though dignified with the highest titles in Ireland, and entitled to sit in the house of lords of that kingdom, they are here only considered as commoners.

The act of the 19th of George II. cap. 38. which, as has already been observed, debars those peers from the privilege of voting, who, within a year preceeding an election, have been twice present at divine service in an episcopal meeting, the pastor whereof has not taken the oaths to government, and does not pray for the king by name, and for the royal family, according to the liturgy of the church of England, does in like manner apply to the electors of commissioners from shires. It is competent to any candidate, or member of the meeting for election, to make an objection on that head, and to prove it, either by one witness, or by the oath of the person objected

objected to; and, if he refuse to depose, when the oath is tendered to him by the preses or clerk of the meeting, he is thereby effectually disabled, either from voting or being elected.

By the act of the 2d of George II. cap. 24. it is declared, That no person convicted of wilful and corrupt perjury shall be capable of voting in the election of a member to serve in parliament.

The same act likewise provides, that every person who asks, receives, or takes any money or reward, by way of gift, loan, or otherwise, or agrees or contracts for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote, in any election of a member to serve in parliament, or who, by himself, or any person employed by him, doth, or shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt, or procure any person to give his vote, or forbear to give his vote, in such elections, shall, for every such offence, forfeit the sum of

L. 500 of lawful money of Great Britain, to be recovered, together with full costs of suit, by summary action or complaint before the court of session, or by prosecution before the court of justiciary; and, from and after judgement obtained against him in such summary action or prosecution, or his being otherwise lawfully convicted thereof, shall for ever be disabled to vote in the election of any member to serve in parliament, and shall also be disabled to hold, exercise, or enjoy any office or franchise, to which he then shall, or at any time afterwards may, be entitled, as a member of any city, borough, town-corporate, or cinque-port, as if he were naturally dead \*.

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\* To check such practices, and to promote the discovery thereof, this statute further enacts, 'That, if any person offending against this act shall, within the space of twelve months after such election as aforesaid, discover any other person or persons offending against this act, so that such person or persons, so discovered, be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all



This statute allows the prosecution for the penalty to be brought either before the court of session or before the court of justiciary. The forms of procedure commonly observed in these courts differ most materially in this respect: In the former, the intervention of juries is unknown; whereas, in the latter, no person can be condemned until a jury has found him guilty of the charge brought against him, or, at least, has found the facts contained in such charge proved. It is likewise an established practice in the court of justiciary, that, along with the indictment, the person accused of a crime receives a list of the witnesses by whom the prosecutor proposes to prove the facts set forth in that indictment, and a list of any writings that are to be produced in evidence against him. But no such practice prevails in the court of session, except in trials of forgery, where that court exercises a proper criminal jurif-

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diction,

‘all penalties and disabilities, which he shall then have incurred, by any offence against this act.’ By the last clause of the statute, any prosecution must be commenced within two years.

dition, and may inflict any punishment, but death. In complaints for recovering the ordinary penalties inflicted by the several statutes relative to matters of election, which are attended only with pecuniary consequences, there is surely no reason for the court of session's departing from their common procedure; but it may, perhaps, be thought, that, in prosecutions founded upon this statute, which imposes not only a heavy pecuniary fine, but also disqualifications and disfranchisements, a greater degree of nicety should be observed. It was accordingly objected to a complaint brought before the court of session, that, along with it, there should have been exhibited a list of the witnesses, and of the writings proposed to be produced, as evidence on the part of the complainer; and in support of this plea it was maintained, that, as that form must have been observed, if the prosecution had been brought before the court of justiciary, so the statute, by giving the prosecutor his choice of resorting either to that court or the court of session, could not mean to put it in his power to make the condition

condition of the person complained of, either better or worse, by bringing it before the one court rather than the other; more especially, as the action was altogether popular, and might be insisted in by any person whatever. But this objection the court had no manner of difficulty to repel \*.

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\* July 1768, Major General Irwin *contra* John Adam of Maryburgh. The merits of this complaint were curious. Three candidates had appeared for the county of Kinross, viz. General Irwin, Captain Bain, and Mr Robert Adam; and the General, in his complaint, alleged, that an agreement had been made between Captain Bain, and Mess. John and Robert Adam, whereby they were to grant bond to Captain Bain for a certain sum of money, and Captain Bain, on the other hand, was to grant an obligation, binding and obliging himself to give his own vote and interest, and to procure the votes of all his friends, for one or other of the Mess. Adam to be member for the county at the ensuing general election; and that, although Captain Bain was not present at the election himself, his friends did accordingly concur, in voting for Mr Robert Adam, in pursuance of the agreement. To this it was answered, that, supposing the facts to be true, they were not sufficient to found a complaint upon the statute; for that, as the bribe was said to have been given to Captain Bain, in order to procure his vote, the stipulation did not take effect, as he did not attend the  
election;

## S E C T I O N IV.

*Of the Alterations in the Circumstances of a Freeholder, sufficient to authorise the turning him off the Roll.*

**I**T has been already mentioned, that, when no complaint is entered against an enrolment within four calendar months, the person so enrolled must continue upon the roll, until an alteration of his circumstances happen, which shall be allowed by the freeholders, at a subsequent Michaelmas meeting,

election; that although the other freeholders voted for Mr Adam, it was not so much as alledged, that they were parties to the corrupt agreement charged in the complaint; and that, even admitting the votes of some of them to have been procured by the influence of Captain Bain, that could never be considered as corruption on their part, there being nothing in law to hinder a person from giving an honest and a fair vote at an election, though he may be prevailed on to vote by the solicitation or interposition of a friend who was to receive a good deed or reward for using his interest with him. The court gave no judgement upon this defence, but allowed a proof before answer; and the complaint was soon after dropt.

ing, or meeting for election, as a sufficient cause for striking him out. It will therefore be proper to consider, what alteration of circumstances ought to be held as a sufficient cause for the freeholders exercising such power.

By an alteration of circumstances, the law understands an alteration of that right or title in respect of which a freeholder has been enrolled.

Supposing, therefore, that a person has been enrolled upon an estate, which he held both in property and superiority, but that, after his enrolment, he parts with the property or *dominium utile*, by granting a feucharter to another; this is no doubt an alteration of circumstances; but it is not an alteration of the title upon which he was enrolled, a bare superiority being sufficient for that purpose, and his right to such superiority still remaining upon its original footing.

Supposing, again, that a person, in the view of making an alteration of his family-settlements, shall resign his whole estate (in respect of which he had been formerly enrolled)



rolled) in the hands of the crown, for the purpose of obtaining a new charter, can he continue upon the roll? or, must he be struck off, and become incapable of being re-admitted, till a year after the registration of the infeftment he takes upon this new charter? There is no doubt, in that case, an alteration of his title; but still his claim to the privilege of a freeholder is as justly founded as ever. He is infeft, and in possession of the very same lands upon which he was originally enrolled; and it certainly was not in the view of the legislature to put improper hardships upon freeholders, but only to order those to be struck off, who had no longer a just title to continue in that character. An objection, founded upon an alteration of circumstances of that kind, ought therefore to meet with no regard. Such freeholders must, however, take care to be infeft as soon as possible; for, if an objection be regularly lodged against them, and they neglect to complete their new titles by infeftment before the Michaelmas meeting, they may with justice be struck off, as wanting

ing one of the fundamental qualifications of a right to be upon the roll.

It appears to be a question of more difficulty, Whether one, who has been enrolled in respect of the whole estate he enjoys within a county, can continue upon the roll, after alienating part of that estate to another, either by a real sale, or with a view to grant to his dispoinee a freehold-qualification? It will, however, be held sufficient to protect him from being struck off, if he can show that he still retains to himself a sufficient freehold-qualification, that is, such as would have entitled him to be enrolled upon a new claim.

A remarkable instance occurred in the county of Cromarty in 1765. M<sup>r</sup>Leod of Cadboll stood enrolled as a freeholder upon his whole estate holding of the crown in that county, which was valued in the cess-books at L. 1361 : 10 : 0. In the view of creating freehold-qualifications to some of his friends, he obtained a division of his *cumulo* valuation amongst the different farms or parcels of which his estate was composed ;  
after

after which, he granted a feu of the whole, in order to separate the superiority from the property. This being done, he obtained a new charter, and granted wadsets of the superiority of particular parts of his estate to some, and conveyances of other parts of it to others of his friends in liferent, and to himself in fee, the lands of which he thus retained the fee appearing, from the division of his *cumulo* valuation, to amount to L. 532 : 6 : 4. An objection being lodged in due time, Mr M'Leod was struck off the roll at the Michaelmas meeting 1765. But, upon a complaint, the court of session found, that he had reserved the fee of lands sufficient to entitle him to remain upon it, and granted warrant for his being replaced, as far of the lands contained in his titles\*.

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\* 17th January 1766, M'Leod of Cadboll *contra* Sir John Gordon; affirmed in the house of lords March 1766. In this case, it did not appear that Mr M'Leod had produced evidence to the meeting of the freeholders, that he had retained a freehold-qualification; but as he instructed that fact under the complaint before the court of session, it was held sufficient to entitle him to be replaced on the roll.

## S E C T I O N V.

*Of the Persons entitled to be elected Commissioners to Parliament from Shires or Stewartries in Scotland.*

HAVING already shown who have a right to vote in the election of commissioners from shires, it now falls to be considered what persons are entitled to be elected.

It is a general rule, that none can be elected, who cannot elect. But this notwithstanding, a county may happen, for a time, to be represented by a person who is not himself entitled to vote in an election for such county. This may appear, at first sight, a singular notion; a moment's attention will, however, show that it is well founded. Let us suppose that a person is elected to represent a county who has no other interest in it but a proper wadset, and that, during the continuance of the parliament,

liament, a declarator of redemption is obtained against him, or that he grants a voluntary renunciation of the wadset. Let us, in like manner, suppose, that a person who stands upon the roll as a proprietor of lands is elected, and that, during the course of that parliament, he sells these lands, or that they are evicted from him, and found to belong to another. In either of these cases, there arises an alteration of circumstances sufficient to authorise the freeholders to strike him off the roll, or to found a complaint, at the suit of an objector, if the freeholders refuse to do so. He will still, however, continue to represent the county till the conclusion of the parliament. Nor is it in the power, either of the freeholders, or of any superior court, to turn him out. Many similar cases might be figured; but the above are sufficient to shew, that, though no person can be duly elected who is not enrolled as having a proper qualification within a county; yet such county may, for a time, be represented by one who is struck off the roll,



roll, and is possessed of no qualification whatever.

But, although none can be elected but those who can elect, many can elect, who cannot be elected.

By the statute, 6to Annae, cap. 7. § 30. it was enacted, that every person disabled to be elected, or to sit or vote in the house of commons of any parliament of England, should be disabled to be elected, or to sit or vote in the house of commons of any parliament of Great Britain. It becomes, therefore, necessary to consider who were disabled by the laws in force in England at that time, as well as the new regulations that have been made in this respect by subsequent British statutes.

Aliens never could be elected members of parliament, not being the King's liege-subjects; and, by the statute 12th and 13th of William III. cap. 2. it was expressly enacted, that, after the limitation of the crown to the Princess Sophia and her heirs should take place, no person born out of the kingdoms of England, Scotland, or Ireland,

land, or the dominions thereto belonging, (although naturalized and made a denizen, except such as are born of English parents,) should be capable to be a member of either house of parliament \*.

None of the twelve judges of England can be chosen, because they sit as assistants, to give their advice when called for in the house of lords †; and, by a British statute ‡, no judge of the court of session or justiciary, or baron of the court of exchequer, in Scotland, can be elected ||.

The clergy, though entitled to vote when possessed of freeholds, are likewise incapable of being elected §. The reason usually given for this in England is, that they sit in the convocation; and I have already had occasion

\* This enactment seems to have been made in order to prevent the influence of foreigners when a foreign family should come to succeed to the crown.

† Coke, 4th Inst. p. 47.

‡ 7th George II. cap. 16. § 4.

|| Since that act passed, we had an instance of a judge of the court of session resigning his gown in order to get a seat in parliament.

§ Coke, 4th Inst. p. 48.

casion to take notice of an act of the Scotch parliament, in the time of James VI. \*, by which it was enacted, that no minister of the gospel should accept, use, or administer any place of judicature, in whatever cause, civil or criminal.

Sheriffs of counties, and mayors and bailiffs of boroughs in England, cannot be elected in their respective jurisdictions, as being themselves returning officers †. And, by the act of the 21st of George II. c. 19. no sheriff-depute can be elected for any county or borough in Scotland. Indeed, by the form of the writ used before that statute, no sheriff could be elected in Scotland; and Fountainhall mentions a controverted election in the Scotch parliament in 1686, where it was objected, that the sheriff-depute had no right to vote; vol. I. p. 413. Provosts or bailies of boroughs may be elected; for, in Scotland, they are not returning-officers.

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\* 1584. C. 133.

† Hale of parliament 114.

By different statutes, none of the persons concerned in the management of any duties or taxes, imposed since the year 1692 (except the commissioners of the treasury) nor commissioners of prizes, sick or wounded, transports, wine-licences, navy and victualling offices, secretaries or receivers of prizes, comptrollers of the army-accompts, agents for regiments, governors of plantations and their deputies, officers of Minorca or Gibraltar, officers of the excise and customs, clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney-coaches, hawkers and pedlars, nor any persons that hold any new office under the crown, erected since 1705, are capable of being elected \*.

It is in like manner enacted, that no person having a pension from the crown, either during

\* 5th William and Mary, cap. 7. § 57. 11th and 12th William III. cap. 2. § 150. et seqq. 12th and 13th William III. cap. 10. § 89. et seqq. 6to Annae, cap. 7. § et seqq. 15th George II. cap. 22.

during pleasure, or for any term of years, shall be capable of being elected; and that any person having such pension, who shall presume to sit or vote in the house of commons, shall forfeit L. 20 for every day he shall so sit or vote, to any person who shall sue for the same in any of his Majesty's courts in Westminster-hall\*. All those who, after being chosen members of the house of commons, accept of any office of profit from the crown (except officers of the army or navy getting new commissions) do likewise vacate their seats in parliament, and writs are issued for new elections, as if they were naturally dead; but, unless the offices accepted by them be of that nature as to disqualify them altogether, they may be re-elected†.

In the writs which were issued for the English parliament, holden at Coventry in the 6th of Henry IV. a prohibition was inserted against electing any man of the law. This, however, was unconstitutional; and as this parliament did, on that account, get

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the

\* 1st George I. cap. 56. † 6to Annae, cap. 7.



the name of *Parliamentum Indoctum*, so Sir Edward Coke observes, that there was not one good law made in it \*.

In England, it is likewise necessary that every knight of the shire have a clear estate, of freehold or copy-hold, to the value of L. 600 *per annum*, and every citizen and burghers to the value of L. 300, except the eldest sons of peers, and of persons who are themselves qualified to be knights of shires, and the members for the two universities †. But the statutes introducing these qualifications are declared not to extend to Scotland.

In order to prevent bribery and undue influence, it was enacted, by the act of the 7th William III. cap. 4. that no candidate, after the ordering or issuing the writ for election, should, by himself, or by any other means for his behoof, give any money, meat, drink, entertainment or provision, to his electors, or promise to give any present, gift, reward, or entertainment, either to particular

\* 4th Inst. 48.

† 9th Annæ, cap. 5. 33d George II. cap. 20.

ticular persons, or to any county, city, town, or place, in order to his being elected; and that all persons offending in that respect should be disabled and incapacitated to sit in parliament for such county, city, town, or place, in consequence of such election. This statute was wisely calculated to restrain a most pernicious practice; but every day's experience shews, that little regard is paid to the putting it in execution.

S E C T I O N VI.

*Of the Mode of Procedure in the Election of Commissioners to Parliament from the Shires in Scotland.*

**H**OW soon a parliament is summoned, the Lord Chancellor sends his warrant to the clerk of the crown, for issuing writs to the sheriff of every county, for the election of the member to serve for such

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county;

county\*; and, by the act 1681, cap. 21. the sheriffs are empowered to appoint the diet  
for

\* In the case of a vacancy happening during the sitting of parliament, the warrant to the clerk of the crown is given by the speaker of the house of commons, by order of the house. When the Earl of Shaftesbury was chancellor, in the reign of Charles II. he assumed the power of issuing writs, while the parliament was prorogued, for electing persons to fill up vacancies in the house of commons. Of this the commons loudly complained, when the parliament met; upon which the king declared, 'That he had given order to the Lord Chancellor to send out writs for the better supply of their house, having seen precedents for it; but, if any scruple or question did arise about it, he left it to the house to debate as soon as they could.' The matter was accordingly taken under consideration the very next day; when the commons voted these writs and returns irregular, and expelled the members who had been elected in consequence of them. It was supposed, at that time, that, if the crown could issue writs for filling up vacancies in parliament, it would be easy for the ministers to get such members returned as they pleased; and we are indeed informed, that those who had been returned upon that occasion were all of them creatures of the court; Rapin, vol. II. p. 669. But, as the speaker could only give a warrant to the clerk of the crown during the sitting of parliament, which was no doubt an inconvenience, a remedy was introduced by the act of the 10th of his present Majesty, cap. 41. which enacted, that, from and after the end of the then session

for election. It must, however, be at least twelve days before the meeting of parliament, and must be published at the head-borough of the shire upon a market-day, betwixt ten and twelve of the forenoon, and at each parish-church on the Sunday imme-

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diately

session of parliament, it should be lawful to the speaker, during the recess of parliament for more than twenty days, whether by prorogation or adjournment, to issue warrants to the clerk of the crown, to make out new writs for electing members of the house of commons, in the room of such as should happen to die during such recesses. But, in order to entitle the speaker to grant such warrant, the death of the member must be certified to him, by a writing under the hands of two members of the house, and he must insert in the London Gazette notice of such certificate fourteen days before the warrant be issued. This statute likewise declares, that the speaker shall have no authority to issue any such warrant, unless the return of the writ, by virtue of which the deceased member was elected, has been brought into the office of the clerk of the crown, fifteen days at least before the end of the session of parliament immediately preceeding the death of such member.

A copy of the writ to the sheriff is to be found in the Appendix, No. 7.

diately after, three days at least before the diet so appointed\*.

The freeholders being assembled upon the day fixed for the election at the head-borough of the shire, and in the sheriff's ordinary court-room, the sheriff produces the writ, and reads it in presence of the meeting, to whom he likewise produces executions of the publication at the market-cross of the head-borough, and the several parish-churches.

This being done, the act of the 2d of Geo. II. c. 24. intituled, 'An act for the more effectually preventing bribery and corruption in the election of members to serve in parliament,' must be read in presence of the meeting†; after which the sheriff-clerk produces

\* 12mo Annæ, stat. 1. cap. 6. § 4. Forms of the intimation made by the sheriff, and of the publication thereof, are to be found in the Appendix, No. 8. and 9.

† This is ordered by the following clause of the statute :  
' And, for the more effectual observance of this act, be it enacted, that all and every the sheriffs, mayors, bailiffs, and other officers, to whom the execution of any writ or precept for electing any member or members to  
serve



produces the book in which the roll of the freeholders, and the minutes of their proceedings, are inserted, together with copies of the oaths of allegiance and abjuration, and of the declaration of assurance, and a copy of the trust-oath, prescribed by the act of the 7th of George II. written on a roll of parchment, in terms of that statute.

These preparatory steps being finished, the sheriff has no further concern in the meeting. The commissioner last elected, if present, takes the chair, and administers the oath of allegiance, and the assurance to the freeholders; and likewise the oath of abjuration,  
in

'serve in parliament, shall belong or appertain, shall, and  
'are hereby required, at the time of such election, immediately after the reading of such writ or precept, read,  
'or cause to be read, openly before the electors there assembled, this present act, and every clause therein contained; and the same shall also openly be read once in  
'the year at the general quarter-sessions of the peace,  
'to be holden next after Easter, for any county or city,  
'and at every election of the chief magistrate in any  
'borough, town-corporate, or cinque-port; and at the  
'annual election of magistrates and town-counsellors for  
'every borough within that part of Great Britain called  
'Scotland.'

in case it be required to be put ; after which, he proceeds to call the roll, and ask the votes for the choice of a preses and clerk to the meeting, having himself the casting or decisive vote, in case of an equality. If the commissioner last elected be absent, the oaths are administered, and the roll called by the sheriff-clerk ; and, in that case, the casting vote belongs, as at the Michaelmas meetings, to the freeholder present who last represented the shire in any former parliament ; if none such be present, to the freeholder who last presided at any meeting for election ; and, in his absence, to the freeholder that last presided at any Michaelmas meeting ; and, failing the attendance of all those, to the freeholder present who stands first upon the roll \*.

To prevent abuses in the choice of preses and clerk, the law has declared, that, if the commissioner last elected, or, in his absence, the sheriff-clerk, receive the vote of any person who does not stand upon the roll,  
he

\* 16to George II. cap. 11. § 13.

he shall, for every such offence, forfeit the sum of L. 300 Sterling to every candidate for the office of preses or clerk, respectively, for whom such person shall not have given his vote, to be recovered by them or their executors, by summary complaint before the court of session, upon thirty days notice; or, if he shall not call for, or refuse the vote of any person whose name is upon the roll, he shall forfeit the like sum to such person, to be recovered by him or his executors in the same summary manner \*.

This is no doubt a most salutary regulation. It, however, requires to be a little better explained, as many cases can be figured, where a judaical adherence to the letter of the statute might appear inconsistent with that idea of justice which the legislature must be supposed to have had in view.

Let it be supposed, that two persons stand upon the roll in virtue of the same lands, the one as liferenter, the other as fiar. Must the commissioner last elected, or the sheriff-clerk,

\* 16to Georgii II. cap. 11. § 13.

clerk, call both, and receive the votes of both in the election of preses and clerk? If the statute is, in every case, to be judaically interpreted, he will incur the penalty, if he omit either the one or the other. But I apprehend, that, as by other statutes, the fiar can only vote in the absence of the liferenter, no court would subject him for omitting to call, or for refusing to receive the vote of the fiar, if the liferenter were present, and claimed his vote.

By the act of the 2d of George II. cap. 24. those who have been convicted of bribery and corruption, are for ever disabled from voting in an election of a member to serve in parliament. Supposing that a person, so convicted, stands upon the roll, Must his name be called, and his vote received in the choice of preses and clerk? I apprehend, that it is not necessary for the commissioner last elected, or the sheriff-clerk, to do so; and that their omitting to call him, or refusing to receive his vote, will not, upon a fair and just construction of the statute, subject them to the penalty.

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It must, however, be admitted, that, in general, the powers of the commissioner last elected, or the sheriff-clerk, in calling the roll, are merely ministerial; and, though they may so far exercise their judgement, as to leave out one whom the law has clearly disqualified, they cannot assume the power of judging, whether a person stands wrongfully upon the roll, and, upon that pretence, refuse his vote in the choice of preses and clerk, however clearly it may appear, that such person will fall to be struck off, after the meeting is properly constituted.

Let it be supposed, that a person has been enrolled, although not a year inest. The freeholders did wrong in admitting him; but that wrong the person who calls the roll has no power to remedy. His name must therefore be called, and his vote received, otherwise the penalty will be incurred.

Again, let it be supposed, that, by a judgement of the court of session, a person standing upon the roll had been ordered to be struck off; but that the sheriff-clerk, in contempt of such order, had neglected, or refused



refused to do so; Will the commissioner last elected be at liberty to refuse such person's vote, in the choice of preses or clerk, or must he call him under the sanction of the penalty? If exercise of judgement, in a case of this kind, be denied to the commissioner last elected, the election of the preses, and, of course, the election of the member to serve in parliament, may be carried by the voice of one, who, by a judgement of the proper court, has been found to have no right to a freehold-qualification \*; but this is a wrong, which I apprehend the commissioner last elected has no power to remedy, without subjecting himself to the penalty. He must call every person who stands upon the roll produced by the sheriff-clerk, and is not legally disqualified; and if, by that means, a candidate is chosen, who otherwise would

\* It may be thought, that abuses of this kind will be prevented by the sheriff-clerk's being subjected to the penalty of L. 100 in the event of his not obeying the order of the court of session; but penalties are often little regarded, in a contested election, and may be made easy to the sheriff-clerk, by the candidate whose interest he means to support by his trespasses.

would have lost the election, the only remedy lies in a petition to the house of commons. But, what will be the case, if, by reason of the absence of the commissioner last elected, the calling the roll shall fall to the province of the sheriff-clerk who has neglected to obey the order of the court of session, and he shall take it upon him to call the name of the person whom he ought to have struck off? It certainly ought to be no excuse to him, that he has obeyed the statute, by calling none but those who stand upon the roll; because it was owing to his own malversation that such person did stand upon it. And though, perhaps, the letter of the law may not exactly reach him, it would surely be no great stretch to find him liable in the L. 300 penalty, for calling one whom he himself ought to have struck off.

A curious case happened in the county of Mid-Lothian, at a meeting for election in 1744. The name of Sir James Stewart of Goodtrees stood upon the roll 1742, which was the one last made up; but there were no minutes extant to show, either the time  
when

when the persons standing upon that roll had been admitted to it, or the titles upon which they were enrolled. The present Sir James Stewart appeared at the meeting, and claimed a vote in the choice of preses and clerk; but the commissioner last elected being convinced, from a variety of circumstances, that the name of Sir James Stewart of Goodtrees, standing upon the roll 1742, was not descriptive of the present Sir James, but of his father, whose name had been omitted to be struck out upon his death, he refused to receive Sir James's vote. Sir James complained to the court of Session, and demanded the statutory penalty; but his complaint was dismissed. This was certainly a just decision; for, although the same name was to be found in the roll; yet the name of the then Sir James Stewart did not stand upon it; and, if the commissioner had called him and received his vote, he would have subjected himself to the penalty inflicted by the first part of this clause of the statute, for receiving the vote of one who does not stand upon the roll.

I shall mention another case of a more recent date, which gave occasion to a great deal of argument. Alexander Frazer of Culduthill stood upon the roll of freeholders of the county of Cromarty, made up at Michaelmas 1767, in virtue of several different parcels of land, rated at L. 426 : 4 : 2 Scots of valued rent, according to a decree of division, made by the commissioners of supply in October 1765. Of these lands, there was one parcel called Glenurquhart, which, by the decree of division, was valued at L. 57 : 18 : 8. Before the election, which took place upon the 26th of April 1768, this decree of division was set aside by the court of session, in an action at the suit of Sir John Gordon of Invergordon, and William Gordon of Newhall, in which it was found, that the lands of Glenurquhart were not entitled to any part of the *cumulo* valuation, divided by the commissioners of supply. In the course of this action, Mr Frazer had admitted, that, if the pursuers succeeded, he would have a bad qualification, as his valuation would be reduced under L. 400. But

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still,

still, no order had been obtained for striking him off the roll, when the day of election came. On the contrary, though it was one of the conclusions of the pursuers action, that it should be declared, that Mr Frazer was not entitled to continue on the roll of freeholders, the court found that conclusion incompetent. It appeared, that, if Mr Frazer was allowed a voice in the choice of preses, his vote would be decisive of the election, there being only six freeholders in the interest of Sir John Gordon, and seven, including Mr Frazer, in the interest of Mr Pultney, the other candidate. An extract of the decree of the court of session being produced, Sir John Gordon, who was the commissioner last elected, tendered to Mr Frazer the trust-oath prescribed by the act of the 7th George II. after filling up, in the blank left in the beginning of that oath, the description of his lands copied verbatim from his claim for enrolment, which bore, not only the names of the several parcels of which these lands were composed, and their local situation, but likewise, that they stood valued at upwards  
of



of L. 400 Scots of valued rent. Mr Frazer refused to take the oath in these terms; upon which Sir John Gordon attempted to erase his name out of the roll in the sheriff's books, but was prevented by others of the freeholders, who took the book from him. Sir John then produced an extract of the roll, and, after erasing Mr Frazer's name from that extract, called the votes of the other freeholders for the choice of preses and clerk. Upon this the two contending parties separated, and made each of them separate elections, which occasioned a variety of prosecutions for statutory penalties. Among others, Mr Frazer of Culduthill prosecuted Sir John Gordon for L. 600, on account of his not calling him in the election of the preses and clerk; and, in support of his complaint, insisted, *1mo*, That, as he stood *de facto* upon the roll, Sir John was bound to call him, how ill founded soever his qualification might be. And, *2do*, That, as the sole purpose of the trust-oath was, to ascertain that the person who claimed a vote was really and truly proprietor of

the lands under which he sought that privilege, and that he did not hold them in trust for any other person, nothing could be inserted in the blank left in the beginning of the oath but the names of the lands ; and that he was not obliged to take it in the manner it was tendered to him, or swear to the valuation. Sir John Gordon, on the other hand, contended, *imo*, That the several acts of parliament, relative to elections, must be expounded by each other, and no particular act implicitly or literally followed, when, by so doing, other statutes, regulating the qualification of electors must necessarily be controlled : That the law had expressly required L. 400 Scots of valued rent to entitle one to vote as a freeholder ; and that, as Mr Frazer's valuation was, by the decree of the court of session, brought below that sum, he would have been justified in refusing Mr Frazer's vote, even though he had taken the trust-oath as it was tendered to him. And, *2do*, That, as the statute of the 7th of George II. had left it a moot point with what precise words the blank in the trust-oath ought to be filled up,  
it

it must have intended, that the person with whom the administering that oath was intrusted should be at liberty to insert such words, adapted to the circumstances of the case, as might answer the intention of the law, the principal object of which was, to allow a vote only to those who, at the time, were infest and in possession of lands liable in public burdens at the rate of L. 400 of valued rent; and that no better rule could be followed for obtaining that end, than by maintaining an exact correspondence between the oath and the claim for enrolment. The court of session found Sir John Gordon liable in one penalty of L. 300, but affoizied *quoad ultra* \*. What effect Sir John's not calling Mr Frazer's vote, in the choice of preses and clerk, ought to have had in the subsequent steps of the election, or upon the merits of the return, will be afterwards considered. At present, I shall only observe, that, according to the late judgement of the house of lords, in the case of Archibald Duff

T 3                      against

\* 19th November 1768, Frazer of Culduthill *contra* Sir John Gordon.

against Sir Ludovick Grant, and others, Sir John Gordon had no authority to put the trust-oath, in any shape, before the election of preses and clerk.

The preses and clerk being chosen, the minutes of their election must be signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, and delivered over to the clerk appointed by the majority of the meeting; and, if either of them neglect or refuse to sign such minutes, and deliver them accordingly, or sign false minutes, he forfeits L. 100 Sterling to the person truly elected preses, to be recovered by him, or his executors, by a summary complaint before the court of session\*.

This act further declares, that it shall not be lawful for any number of freeholders to separate from the majority of the persons present who stand upon the roll, and to set up any person as preses and clerk, other than those who shall be chosen by the majority. In order to enforce this rule, it is enacted,  
that

\* 16to Georgii II. cap. 11. § 15.

that those who separate from the majority, and set up any other as preses and clerk, shall forfeit L. 50 to the candidate who shall be chosen by the majority from whom such separation is made; and that any person who presumes to act as preses or clerk, without being chosen by the majority, shall forfeit L. 200 to such candidate, to be recovered in the same manner with the penalties already mentioned\*.

The clerk chosen by the majority qualifies himself by taking the oaths of allegiance and abjuration, and subscribing the assurance; and, by the statute of the 16th of

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George

\* § 14. I have mentioned above, that, at the election for the county of Cromarty in 1768, the two parties separated, upon Sir John Gordon's refusing to call Mr Fraser of Culduthill's vote in the choice of preses and clerk, and made separate elections. This produced mutual complaints upon this clause of the statute; but the court found Sir John Gordon's party in the wrong, and that each of them had incurred the penalty of L. 50, on account of their having separated from the majority; and that Mr McIntosh, whom they had set up as preses, had forfeited L. 200 for acting in that character; 19th November 1768, William Pulteney, Esq; and others, *contra* Sir John Gordon, and others.



George II. so often referred to, he must likewise take the following oath, which the pre-  
 ses is required to administer \*: ‘ I A. B. do  
 ‘ solemnly swear, That I have not, directly  
 ‘ or indirectly, by way of loan, or other  
 ‘ device whatsoever, received any sum or  
 ‘ sums of money, office, place, or employ-  
 ‘ ment, gratuity or reward, or any bond,  
 ‘ bill, or note, or any promise of any sum or  
 ‘ sums of money, office, place, employment,  
 ‘ or gratuity whatsoever, by myself, or any  
 ‘ other, to my use, or benefit, or advantage,  
 ‘ to make any return at the present election  
 ‘ of a member to serve in parliament; and  
 ‘ that I will return to the sheriff or steward  
 ‘ the person elected by the majority of the  
 ‘ freeholders upon the roll made up at this  
 ‘ election, and who shall be present and  
 ‘ vote at this meeting. So help me God.’

The trust-oath is then put, if required by  
 any one of the freeholders present; and, if  
 any two of them demand it, the oath of  
 bribery, introduced by the act of the 2d of  
 George

George II. must likewise be taken, before voting for the member to serve in parliament. This oath is as follows: ‘ I A. B. do  
‘ swear, (or, being one of the people called  
‘ Quakers, I A. B. do solemnly affirm)  
‘ I have not received, or had, by myself, or  
‘ any person whatsoever in trust for me, or  
‘ for my use and benefit, directly or indirectly, any sum or sums of money, office,  
‘ place, or employment, gift or reward, or  
‘ any promise or security for any money,  
‘ office, employment, or gift, in order to  
‘ give my vote at this election, and that I  
‘ have not before been polled at this election \*.

The meeting being constituted, by the election of a preses and clerk, the freeholders  
proceed

\* 2do Georgii II. cap. 24. § 1. Had this oath been applicable only to elections of commissioners from shires in Scotland, these last words would have been unnecessary. But, as it is applicable to all elections through Great Britain, and as, in many counties of England, the number of voters is so very great, as to put it out of the power of the presiding officers to know them all, either by their names or by their faces, the addition was extremely proper.

proceed to adjust the roll, in the same manner as they do at the Michaelmas meetings; and a new roll being made up (a signed copy or extract whereof must be delivered to the sheriff-clerk, to be recorded in the sheriff's books) the preses calls that roll, and asks the votes of those present who stand upon it, for the choice of the commissioner to represent the county in parliament, having himself the casting or decisive voice in case of an equality \*.

We have already seen, that severe penalties are imposed, to prevent undue practices in calling the roll for the choice of preses and clerk; and, to guard against the like abuses in the choice of the commissioner, it is enacted, that if, in such election, the preses receive the vote of any person who does not stand upon the roll made up by the meeting, he shall, for every such offence, forfeit L. 200 Sterling to any candidate for whom such person shall not have given his vote; and that, if he do not call for, or refuse the  
vote

\* 16to Georgii II. cap. 11. § 13.

vote of any person whose name is upon that roll, he shall forfeit the like sum to the person who has not been called for, or whose vote has been refused, to be recovered in the same summary way with the other penalties imposed by the statute \*.

The law does not require that the person who is chosen commissioner should be present at the meeting for election; but, as the trust-oath cannot be put to him in his absence, it is enacted, that, before taking his seat in parliament, he shall take that oath before the Lord Steward of his Majesty's household, or any person authorised by him for that end; and that, if any member elected in his absence, shall neglect or refuse to take such oath, his election shall be void †.

The election being made, and the minutes being signed by the preses and clerk of  
the

\* 16to Georgii, II. cap. 11. § 13. I shall here mention, once for all, that, by the last clause of this statute, no person can be made liable to any incapacity, disability, forfeiture, or penalty thereby imposed, unless a prosecution be commenced within one year after such incapacity, disability, forfeiture, or penalty, shall be incurred.

† 16to Georgii II. c. 11. § 10.

the meeting, the freeholders have nothing further to do in the matter.† The rest of the business, which is purely ministerial, devolves, first upon the clerk of the meeting, and next upon the sheriff, whose province it is to return the writ for election to the crown-office in chancery. The duty incumbent upon these officers, and the forfeitures and penalties imposed by the legislature, in order to keep them within the bounds of that duty, and to prevent their abusing the powers committed to them, shall be explained in the next section.

## S E C T I O N VII.

### *Of Returns by Clerks and Sheriffs.*

THE representatives of shires, in the parliament of Scotland, received commissions directly from the freeholders, whence they got the name of Commissioners. By the act 1587, c. 114. these commissions must have been sealed and subscribed by at least six of the barons; and, by a subsequent statute 1597, c. 27. no barons were to be received



ceived in parliament, as commissioners from shires, without producing sufficient commissions, signed in a full convention of the freeholders, and authenticated by the subscription of a great number of those who were present, and by the subscription of the clerk to the meeting. The elections are now, however, verified in a different manner, by the intervention of ministerial officers, over whose conduct the legislature has been particularly watchful.

The meeting of the freeholders being over, the clerk chosen by that meeting must immediately return to the sheriff the person elected by the majority in the manner above stated \*; and, in case such clerk refuse or neglect to return the person so elected, or return any other person to the sheriff, he, for every such offence, forfeits L. 500 sterling to the candidate chosen by the majority. The like fine is also imposed upon every person who presumes to act as clerk, tho' not duly elected,

\* 6to Annæ, c. 6. § 5.

elected, and returns any other than the person elected by the majority of the freeholders.\*

At the general election 1741, the honourable Mr Hume Campbell, and Sir John Sinclair of Longformacus, were candidates for Berwick-shire. Mr Hume Campbell, as the commissioner last elected, proceeded to call the roll made up at the last Michaelmas head-court. But Sir John Sinclair gave in protests against eleven of the freeholders standing upon that roll, setting forth objections against their titles to vote, and insisting that their names should not be called for the choice of preses and clerk. On the other hand, Mr Carre of Nisbet, who supported Mr Hume Campbell, protested against the votes of fifteen freeholders of Sir John Sinclair's party. Mr Hume Campbell called the roll for the choice of preses and clerk as it stood, without regarding the protests on either side. The number of voters was sixty-six, of whom thirty-five voted for Sir Robert Pringle, and James Pringle, the persons set up by  
Mr

\* 7mo Geo. II. c. 16. §; 16to Geo. II. c. 11. §. 16,

Mr Hume Campbell to be preses and clerk, and thirty-one for Sir John Hume of Manderston, and John Sinclair, who were set up for these offices by the other party. Upon this a separation happened; each party proceeded to enrol and strike off several freeholders, and each elected a member. John Sinclair, the clerk elected by the minority, was prosecuted, by Mr Hume Campbell, before the court of session, upon the act of the 7th George II. That court acquitted him; but their judgement was reversed in the house of lords, and he was found liable in the statutory penalty of L. 500. The defence for John Sinclair, which was sustained in the court of session, was founded upon the words of the statute, by which the penalty was imposed only upon those persons who should presume to act as clerks, though not *duly* elected, and *wilfully* return to the sheriff persons not duly elected by the major part of the meeting; and Mr Sinclair endeavoured to excuse himself upon this ground, that he thought himself *duly* elected clerk, and considered the merits of the election to be with  
the

the person he had returned; and therefore was not guilty of a *wilful* false return. But to this it was held to be a sufficient answer in the house of lords, that, as the whole matter was transacted in Mr Sinclair's own presence, and the attempts of the separating freeholders were so manifestly illegal, that there was no room for any pretence of ignorance or involuntary transgression, he had undoubtedly subjected himself to the penalty of the statute.

The partiality of sheriffs is in like manner guarded against by severe penalties. Upon production of a copy of the roll last made up, extracted and signed by the sheriff-clerk, and of the original minutes of the election of preses and clerk, signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, the sheriff must annex to the writ the return made by the clerk chosen by the majority of the freeholders standing upon the roll so produced to him; and, if he fail to annex such return to the writ, or annex to it a return made by any other person, pretending to be clerk to the election, he forfeits L. 500  
sterling

sterling for every such offence to the person returned by the clerk, and chosen by the majority of the freeholders, to be recovered in the same summary manner, with the other penalties or forfeitures imposed by the statute \*.

Besides these forfeitures, sheriffs and clerks who are guilty of making false returns, are liable to be otherwise punished, when the matter is brought before the house of commons. In the case of Berwickshire above mentioned, the sheriff-depute accepted of two different returns, one from the clerk chosen by the majority, and another from John Sinclair who was chosen by the minority of the freeholders; and having annexed both returns to the writ, the house of commons not only ordered the return made by the clerk chosen by the minority to be taken off the file, but likewise resolved, ‘ That David Hume of Wedderburne, sheriff-depute of the shire of Berwick, having accepted and returned to the clerk of the crown in

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‘ chan-

† 16to Geo. II. c. 11. § 17.



‘ chancery, an indenture of return of a com-  
 ‘ missioner to serve in this parliament for  
 ‘ the shire of Berwick, not being signed by  
 ‘ the proper clerk, has acted arbitrarily and  
 ‘ illegally, in defiance of the laws of the  
 ‘ land, and the privilege of this house, and  
 ‘ ordered, that the said David Hume be, for  
 ‘ his said offence, taken into the custody of  
 ‘ the serjeant at arms attending this house \*.’

The law does not require, that the subsequent minutes of the freeholders, after the meeting is constituted by the election of a preses and clerk, be produced to the sheriff. He has no concern with the minutes of the election of the member, and is bound to annex the return made by the clerk, without the privilege of inquiring, whether the person so returned was properly elected or not. Though one should be returned to him who is totally disqualified, he must annex that return, provided it be made by the clerk named by the majority of the freeholders

\* Journals of the house of commons, Martis 19no die Januarii, anno 15to Georgii 2di regis, 1741.

holders standing upon the roll last made up; he is a mere ministerial officer; he has no power to exercise his judgement, and needs only eyes and honesty to teach him his duty, and enable him to fulfill it.

Penal laws, imposing fines and punishment upon persons guilty of statutory offences, ought to be expressed in the clearest and most unambiguous terms, so as to point out, with the utmost precision, the duty of ministerial officers, against whom such fines and punishment are levelled, in every possible case, and to remove every room for doubt, whether or no they have been actually guilty of the offences which subject them thereto. This, however, is not the case with the clause of the statute of the 16th of George II. which is now under consideration; and questions having arisen upon it, attended with a good deal of nicety, and on which, it is believed, even lawyers have entertained different opinions; I shall give the reader a short account of one case that occurred only a few years ago.

I have already had occasion to mention part of the proceedings, at the election for the county of Cromarty in April 1768, and that Sir John Gordon, after the book in which the roll last made up was inserted had been taken from him, to prevent his erasing the name of Mr Frazer of Culduthill, produced an extract of it, and erased Mr Frazer's name out of that extract. Sir John then proceeded to call the votes for the choice of preses and clerk from that extract. Himself and five others voted Mr Robert M'Intosh to be preses, and George Bean to be clerk; Mr Pultney and other five voted Mr Pultney to be preses, and Alexander M'Kenzie the sheriff-clerk of the county to be clerk to the meeting; and Mr Frazer not being called, Sir John Gordon assumed a casting or decisive vote, which he gave in favour of Mr M'Intosh and Mr Bean; after which, he, in the same character of commissioner last elected, signed the minutes of their election, and delivered them to Mr Bean. Upon this Sir John's party proceeded to the steps of election of the member to serve in parliament,

ment, and chose him unanimously, Mr Pultney and his friends, though all called upon by the preses, except Mr Frazer, making no answer. The other party were not, however, idle spectators of what was going on, nor would they acquiesce in these proceedings of Sir John Gordon and his friends. Having gone to another part of the room, with the sheriff's book in which the roll last made up was inserted, and having admitted Mr Frazer, who likewise voted for Mr Pultney to be preses and Mr M'Kenzie to be clerk, a minute of their election was made up, and signed by Mr M'Kenzie, in the character of sheriff-clerk, and by the whole seven freeholders in Mr Pultney's interest; after which they proceeded to make an election of the member to serve in parliament, and unanimously made choice of that gentleman, neither Sir John Gordon, nor any of his party making any answer when their names were called.

Both clerks made returns to the sheriff; but with this difference, that Mr Bean produced minutes of an election of preses and

clerk, signed by the commissioner last elected; whereas the minutes produced by Mr M'Kenzie were only signed by himself as sheriff-clerk, and by the freeholders in Mr Pultney's interest.

The sheriff annexed to the writ the return made by Mr M'Kenzie, giving for his reason, in answer to a protest taken against him for Sir John Gordon, 'that having been  
' present during the course of the election,  
' having heard all the minutes read, and given his utmost attention to the whole proceedings therein for sixteen hours, he made  
' his return in favour of William Pultney, Esq; according to conscience, the best of  
' his judgement, and so far as he was able  
' to conceive, according to law.'

Sir John Gordon preferred a complaint to the court of session, and contended, That the sheriff had no power to review or correct the proceedings of the commissioner last elected in calling the roll for the choice of preses and clerk: That, if the commissioner last elected did wrongfully or improperly refuse



fuse the vote of a person standing upon the roll last made up, he thereby subjected himself to the penalty imposed by the statute for such offence; but the sheriff had no power to correct that wrong: That he was a mere ministerial officer, bound to annex to the writ the return made by the clerk chosen by the freeholders: That, in order to discover to him the person so chosen, the law had ordered the minutes of the election of preses and clerk, signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, to be produced to him: That he was bound to consider these minutes, so authenticated, as a *probatio probata* of that fact, and was not at liberty to betake himself either to the evidence of his own senses, or to any other evidence whatever, in contradiction thereto: That the minutes produced by Mr M'Kenzie were entitled to no regard, because they were not signed by the commissioner last elected, although he was present in the room; and that the sheriff, by refusing to annex the return made by Mr Bean, and by annexing the return made by Mr

M'Kenzie, had incurred two several penalties of L. 500 each.

The sheriff, on the other hand, maintained, That, as the law directed him to annex the return made by the clerk chosen by the majority of the freeholders standing upon the roll last made up, he had accordingly done so, Mr M'Kenzie having been chosen to that office by seven of these freeholders; whereas only six had voted for Mr Bean: That he was by no means bound to consider the minutes signed by the commissioner last elected as a *probatio probata* that the clerk named in these minutes had been truly chosen by a majority of the freeholders standing on the roll last made up: That, if the law had so intended, it would have ordered nothing more to be produced to him; but, as it likewise ordered the production of a copy of the roll last made up, extracted and signed by the sheriff-clerk; so it was apparent, that the legislature must have had it in view to enable him thereby to judge whether the minutes signed by the commissioner last elected were true or false, and whether the person  
named

named as clerk in these minutes was truly chosen by the majority of the freeholders standing upon that roll: That, if the doctrine pleaded by Sir John Gordon were to be listened to, it would throw the return entirely into the hands of the commissioner last elected, which was an absurdity the legislature never could fall into; and that as he, the sheriff, had complete evidence before him, both from what he himself saw passing at the meeting, and from the minutes of election of preses and clerk, signed by Mr M'Kenzie, and seven freeholders standing upon the roll last made up, that Mr M'Kenzie was the clerk chosen by the majority of the freeholders standing upon that roll, he was, in the direct terms of the statute, as well as in conscience, bound to annex the return made by that gentleman.

This was a nice case. On the one hand, if sheriffs are bound to consider the minutes signed by the commissioner last elected, or, in his absence, by the sheriff-clerk, as the only evidence from which they are to discover whose return they may with safety an-

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nex to the writ, it is not easy to figure a reason why the roll last made up should be ordered to be produced to them. On the other hand, it is plain, that the production of that roll cannot, in every case, have the effect to show them whether the clerk named in the minutes signed by the commissioner last elected, or the sheriff-clerk, was truly chosen by the majority standing upon it. They may, indeed, upon comparing the roll with the minutes, discover whether any person has been allowed to vote who did not stand upon that roll; but, unless the minutes are fairly and distinctly taken down, it may happen, that they cannot learn from them whether the persons standing upon the roll, whose names are not mentioned as voters in the election of preses and clerk, were wrongfully omitted to be called; such persons may have been absent from the meeting; they may have been disqualified; or may have refused to take the oath of abjuration; and, unless such circumstances are mentioned in the minutes, the sheriff may remain in a state of uncertainty whether the person who

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in fact was legally elected clerk had been chosen by a majority of the freeholders standing upon the roll last made up. If, however, the minutes are drawn up with proper accuracy and precision, the sheriff can be under no difficulty of discovering the truth. In the particular case now mentioned, the matter was clear from the very minutes signed by the commissioner last elected; as it from thence appeared, that Sir John Gordon had actually refused to call one of the freeholders whose name stood upon the roll last made up, and had even erased his name out of the extract of that roll from which he called the votes for the choice of preses and clerk. The court of session, after considering the question with the utmost deliberation, acquitted the sheriff from the complaint brought against him \*.

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\* 19th November 1768, Sir John Gordon *contra* Rose of Kilravock. In all these complaints, which were brought after the election for the county of Cromarty in 1768, reclaiming petitions were offered against the judgments pronounced by the court of session. But these petitions, though answers were put in to them, were never advised;



The sheriff, after annexing the return made by the clerk, must next return the writ to the crown-office whence it issued \*. And by an act of the English parliament †, made perpetual by a British statute §, the clerk of the crown is ordered to enter, in a book kept for that purpose, every single or double return of any member to serve in parliament that shall come into his office, or into his hands, and every alteration or amendment that shall be made by him, or his deputy, in such returns. It is also thereby ordered, that all persons shall have access to such book, to search and take copies therefrom, upon paying reasonable fees; and that, if the clerk of the crown do not enter the returns in his book, within six days after they come to his hands, or make any alteration upon them, unless by order of the house of commons, or give any certificate of any person

advised; the two contending parties having referred all the questions between them to the amicable determination of two honourable gentlemen, who, I believe, have not hitherto pronounced any decreet-arbitral.

\* 6to Annae, cap. 6. § 5. † 7mo et 8vo Will. III. cap. 7. § 12mo Annae, stat. 1. cap. 15.

person not returned, or wilfully neglect, or omit to perform his duty in the premisses, he shall, for every such offence, forfeit to the party aggrieved L. 500, to be recovered in any of his Majesty's courts of record at Westminster, and shall also forfeit and lose his office, and be for ever after incapable of holding it\*.

## TITLE

\* The form of the sheriff's annexing the return made by the clerk to the writ is to be seen in the Appendix, No. 10.

## T I T L E VI.

### Of the Election of the Representatives of Royal Boroughs.

**I**T has been already mentioned, that the city of Edinburgh returned two, and each of the other royal boroughs one representative to the Scotch parliament; but that only fifteen in all are sent from the cities and boroughs in Scotland to the British parliament, the city of Edinburgh electing one, and the other boroughs being divided into fourteen several classes or districts, each of which chuses a burghers to represent the whole boroughs of which it is composed.

The manner of electing these representatives, and the qualifications necessary to entitle them to be elected, shall be fully considered. But, as the right of election is lodged,  
not

not in the whole body of the inhabitants, but in the magistrates and town-council of the several boroughs, it will be proper to consider, in the first place, how these electors come themselves into their offices, and what regulations the legislature has laid down in order to prevent undue influence, or to remedy abuses committed in the election of such office-bearers.

## S E C T I O N I.

*Of the annual Elections of Magistrates and Counsellors of the Royal Boroughs in Scotland.*

**T**HERE is no general rule fixing a certain number of magistrates or counsellors, or laying down one precise mode of election, to take place in all royal boroughs. Each borough has its own particular constitution or set, as it is commonly termed, the direc-

directions whereof must be literally obeyed. In some, the sets have been established by the convention of the royal boroughs, which meets once a-year in Edinburgh, and is composed of commissioners sent from each borough, to treat and deliberate upon what respects the interest of the body in general, or of any individual borough in particular. In others, the sets have no other authority than antient usage, which, until it be varied by the convention, is equally binding and necessary to be followed.

All boroughs, however, stand upon the same footing in this respect, that the magistrates and counsellors must be annually elected; and, if the election does not proceed upon the particular day authorised by the set of a borough, no other election can take place until a warrant for a poll is obtained from the king in council \*.

The first thing done at an election of magistrates and counsellors, is to read the act of the

\* The nature of these warrants, and the procedure that takes place in consequence of them, will be afterwards explained.



the 2d of George II. cap. 24. ; after which the electors take the oaths to government, and go through the several steps of election in the terms of the set of the borough.

In political disputes, it is but too common to resort to measures which cannot be easily justified, and to fall upon devices to elude what is understood to be the common law of the land, when it interferes with the ambitious views of individuals, who find that they cannot carry their point by conforming to its dictates. The legislature has, therefore, found it necessary to make particular enactments, to prevent abuses of that kind.

Amongst other devices, it was not uncommon for the minority to separate from the majority, at the annual election of magistrates and counsellors, and for each party to make a separate election. This produced two sets of magistrates and counsellors in the same borough, and frequently occasioned commissions to be given to two different persons, as commissioners for electing a burgess to represent the district in parliament. To prevent this evil in time to come, it was

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declared,

declared, by the act of the 7th of George II, c. 16. § 6. that every election to be made by any magistrates or counsellors, in opposition to the majority, should be, *ipso facto*, void, and that every magistrate or counsellor who concurred therein should forfeit L. 100 sterling to the magistrates and counsellors from whom they so separated, to be recovered by a summary complaint before the court of session, upon fifteen days notice. By the act of the 16th George II. cap. 11. it was more particularly enacted, ‘ That at the annual election of magistrates and counsellors, ‘ and in all the proceedings previous to the ‘ election of the magistrates and counsellors, ‘ for the succeeding year, it shall not be lawful for the minority of any meeting for election, either of magistrates, or counsellors, ‘ or deacons, or other persons, who, by the ‘ constitution of the respective boroughs, may ‘ have a vote in the election of magistrates ‘ or counsellors, to separate from the majority of those having a right to act by the ‘ constitution of the borough, at such meetings, upon any pretext whatsoever, nor to ‘ make

‘ make any separate election of magistrates,  
‘ counsellors, or electors ; but the minority  
‘ shall, in all cases, submit to the election made  
‘ by the majority in all points of the election ;  
‘ and, if any person, elected by the minority  
‘ of any such meeting shall presume to vote  
‘ in the election of magistrates, or counsellors, or in any other step of the election, he  
‘ shall forfeit the sum of L. 100 to any one  
‘ of the majority of such meeting, to be recovered by way of summary complaint before the court, upon thirty days notice.’

The statute last mentioned likewise provides, that no person, elected by a minority, shall, upon any pretence, presume to act as a magistrate or counsellor ; and that every person offending in that respect shall forfeit L. 100 sterling, to be recovered in the same summary manner, by any of the magistrates or counsellors elected by the majority, who shall sue for the same.

These statutory regulations were, however, only introduced, to prevent the evil arising from double elections, and were nowise intended to secure success to the majority, when

their proceedings were illegal or unconstitutional. On the contrary, it was expressly enacted by the first mentioned act, that it should be lawful to any magistrate or counsellor of a borough, who apprehended any wrong to have been done at an annual election, to bring his action before the court of session, at any time within the space of eight weeks, for the rectification of such abuse, or for the total voidance of the election, if illegal; but this statute not being found sufficient, in respect that it only authorised a magistrate or counsellor to bring such action, a more effectual remedy was introduced by the other act of the 16th of the same king, which, in so many words, enacts: ‘ That it shall, and  
‘ may be lawful to and for any constituent  
‘ member at any meeting for election of magistrates or counsellors, or of any meeting  
‘ previous to that for the election of magistrates or counsellors respectively, who shall  
‘ apprehend any wrong to have been done  
‘ by the majority of such meeting, to apply  
‘ to the said court of session, by a summary  
‘ complaint for rectifying such abuse, or for  
‘ making

‘ making void the whole election made by the  
‘ majority ; or for declaring and ascertaining  
‘ the election made by the minority \* ; so as  
‘ such complaint be presented to the said  
‘ court of session within two calendar months  
‘ after the annual election of the magistrates  
‘ and counsellors, and the said court shall  
‘ thereupon grant warrant for summoning the  
‘ magistrates and counsellors elected by the  
‘ majority, upon thirty days notice, and shall  
‘ hear and determine the said complaint sum-  
‘ marily, without abiding the course of any  
‘ roll ; and shall allow to the party, who  
‘ shall prevail, their full costs of suit †.’

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\* There is here an inaccuracy of expression, which ought of all things to be avoided in statutory regulations. To talk of ascertaining or declaring the election made by the minority, seems inconsistent with the former part of the statute, which expressly forbids the minority to make any election, and enjoins them under severe penalties to submit in all things to the majority. The intention of the legislature would have been more clearly expressed, had this part of the clause run thus : ‘ Or, for declaring and ascertaining the persons voted for by the minority, to be the persons legally elected.’

† 16to Geo. II. c. 11. § 24.



This statute limits the time for giving in a complaint to two calendar months. What then is to be done, if the court of session do not sit till these two calendar months be expired? This can rarely occur; but it actually happened in the year 1765. The annual election of the borough of Pittenweem was held that year upon the 10th of September. The court of session not meeting till Tuesday the 12th of November, it was impossible that, taking the words in a strict literal sense, a complaint could be presented before the lapse of two calendar months. To remove this seeming block in the way, the persons who were dissatisfied with the proceedings at the election lodged their complaint with one of the clerks upon Saturday the 9th of November, and put printed copies into the judges boxes that same day. And, although it was keenly urged, that no complaint could possibly be presented, when the court neither was, nor could be sitting, that objection was overruled.

ruled \*. Had the election happened a few days sooner, so as the two calendar months had expired before the Saturday, which was the day for putting those petitions into the boxes that were to be moved in court at their first diet, no complaint would probably have been received. The law is not, however, altogether defective on that account. The mode of summary complaint is introduced in favour of those who apprehend a wrong to have been committed, but does not prevent them from seeking redress in the way of an ordinary action of reduction.

When a complaint, or even an action of reduction, is brought by a minority, for the purpose of setting aside an election, all the magistrates and counsellors must be made parties; and the omitting any one of them is fatal †. Nay, a misnomer has been held sufficient to cast a complaint, although the

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counsellor

\* 14th December 1765, Peter Ramsay, and others, *contra* Thomas Martin, and others. This judgement was affirmed by the house of lords, 7th February 1766.

† See 18th February 1755, Henry Gillies, and others, *contra* Allan Waugh, and others.

counsellor to whom it applied was so described, that there could be no doubt of his being the person meant to be called. Of this an instance occurred in a complaint for setting aside the election of magistrates and counsellors of the borough of Anstruther-Easter in 1765. The minority, in their complaint, erroneously prayed for a warrant to serve it, amongst others, against 'Thomas Brown wright there, and one of the pretended counsellors of the said borough for the present year;' whereas this counsellor's name was not Thomas, but George. This mistake was discovered before the complaint was served upon him, and both the copy of citation given to him, and the execution returned by the messenger, bore, that he had been erroneously named 'Thomas' in the complaint, and in the warrant for service: It was, however, objected, That, as there was no warrant to cite George Brown, he had been called into court without authority; and, therefore, was not bound to answer.

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The court sustained the objection, and dismissed the complaint \*.

The statute authorises complaints to be brought by any constituent member at the meeting. These words seem to exclude those who did not attend the meeting from the privilege of complaining: But the court of session sustained a complaint against the election of the magistrates and counsellors of St Andrew's, in the year 1745, although the complainers were not present, and held it to be a sufficient title that they were constituent members of the council †.

The statute only authorises a summary complaint on account of wrongs done at an annual election. The elections which may take place during the course of the subsequent year, by filling up vacant places, cannot therefore be the subject of such complaint ‡.

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\* January 1766, Alexander Young, and others, *contra* Andrew Johnston, and others.

† 4th June 1747, Counsellors of St Andrew's *contra* the Magistrates.

‡ 28th February 1754, Andrew Glafs, and others, *contra* the Magistrates of St Andrew's.

The wrongs or abuses that may give rise to complaints, under the authority of the statute of the 16th of George II. are of various sorts; and it must depend upon the particular nature of such abuses, and the influence they may have had, whether they will have the effect to operate a total reduction of the election, or only to set aside certain steps thereof.

Elections of all kinds ought to be free. Whatever, therefore, deprives an elector of the freedom of his voice is an abuse. Force, or violence, is of course a good ground of complaint: And it was accordingly found, in the case of the magistrates and town-council of Inverkeithing, that the votes of certain deacons, given at the stair-foot of the court-room, ought to be reckoned in the same manner as if they had been given in council, these deacons being forcibly debarred from entering the court-room \*. And, in a later case from the same borough, where  
force

\* 29th January 1745, Mr John Cunningham, and others, *contra* Sir Robert Henderion, and others.



force was proved to have been used upon the part of the majority, it was held to be sufficient to annul the election made by them \*. Threats may no doubt have the same effect, provided they be of such a nature as to give a just ground of fear; for then they are equivalent to force. The waylaying of electors, and the enticing them, by drinking or otherwise, to keep away from the election, is likewise a just ground of complaint; but the most common of all is bribery, which, however much the legislature has endeavoured to prevent it, is but too often practised, to the imminent corruption and destruction of the morals of a great part of the body of the people.

To mention all the different complaints which have been brought upon the head of bribery, and to state the particular circumstances with which each case was attended, would fill a large volume. I shall therefore only offer a few observations, and lay down some general principles, leaving the reader  
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\* 11th March 1761, Captain Haldane, and others,  
*contra* Admiral Holburn, and others.

to consult the particular cases that have been determined, and to form his opinion, how far the proof brought in such cases was sufficient to justify the judgements they received.

Bribery is practised in many shapes, but may notwithstanding be properly enough reduced to two different kinds, viz. money given, or other good offices done or promised for the behoof of a corporation in general, or given or promised to the electors in particular.

Of the former there have been sundry instances. Money has been given for the purchase of a town-clock, for erecting public edifices, or for paying the debts due by a borough; and even promises of that kind, though they never were performed, have been held sufficient to reduce an election. I shall mention two remarkable cases.

Upon the death of the late Sir Hary Erskine, who represented the boroughs of Pittenweem, Anstruther-Easter, Anstruther-Wester, Crail, and Killrenny, several candidates appeared, but they all soon quitted the field,

field, except two, Sir John Anstruther of Anstruther, and Mr Robert Alexander merchant in Edinburgh. It was of the utmost consequence to both candidates, to get a set of magistrates and counsellors chosen at the annual election in September 1765, in whom they could confide. Sir John Anstruther's interest prevailed in the boroughs of Anstruther-Easter and Crail; but Mr Alexander was successful in the other three boroughs of Anstruther-Wester, Kilrenny, and Pittenweem. Each party accused the other of having had recourse to bribery and corruption, and complaints were accordingly preferred to the court of session, for setting aside the election of magistrates and counsellors made in each of the five boroughs.

In the complaint respecting the borough of Pittenweem, no proof was brought of bribes given to individuals; but it appeared to the court, that, before the Michaelmas election, a bargain or agreement had been entered into with a leading man in the magistracy, in behalf of the corporation, whereby the town's debt was to be paid, provided  
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the town-council would elect a commissioner or delegate to vote for Mr Alexander; and, although it was strongly maintained from the proof, that this bargain was only to hold in the event of the council's being unanimous, and that the oath of bribery introduced by the act of the 2d of George II. should not be put at the election of the commissioner; that the council were not unanimous; that the oath of bribery was put at that election; and that the town's debt had not been paid; the court found, 'That the election of magistrates and counsellors of the borough of Pittenweem, made on the 10th day of September 1765, was brought about by the means of bribery and corruption; and therefore found the same void and null, and reduced, decerned, and declared accordingly \*.' It was held a sufficient answer to the defence, that the delay of performing the agreement by paying the town's debt, was owing to the impending bribery-

\* 28th January 1767, Peter Ramsay and others *contra* Thomas Martin and others. This judgement was affirmed in the house of lords, 27th March 1767.

bribery-oath; that the treaty had operated as effectually as if it had been actually completed; and that, although it was given out that the bargain was at an end, in order to make way for the taking of that oath, it was still understood and believed by the magistrates and counsellors, that the agreement would be fulfilled.

The other case happened soon after. Two candidates having started for the boroughs of Haddington, Jedburgh, Dunbar, Lauder, and North-Berwick, at the general election in 1768, it was of the utmost consequence to secure an interest in Jedburgh, whose turn it was to be the presiding borough, and of course to have the casting or decisive voice, in case of an equality. With that view the brother of one of the candidates, who seems to have supposed, that there was nothing criminal in making a present to the corporation in general, if he abstained from bribing individuals, did, upon the 6th of November 1766, grant two several acceptances, one for L. 1250 for the use and behoof of the  
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the town, and another for L. 250 for the use and behoof of the trades of that town. These acceptances were made payable to two of the then magistrates of the borough, who, upon receiving them, granted an obligation, importing, that, if the borough did not give its vote, at the ensuing general election for Captain Maitland, the brother of the acceptor, they should be returned; and, of the same date, an act of council passed, and was entered in the council-books of the following tenor: ‘Which day, we the magistrates  
 ‘and council of the borough of Jedburgh  
 ‘subscribing, being fully in council assembled,  
 ‘and taking into our consideration, that several candidates have offered themselves to  
 ‘represent our district of boroughs next parliament, and we having a special regard for  
 ‘the Honourable Captain John Maitland,  
 ‘who has suffered in the service of his country, and has offered himself as a candidate;  
 ‘we do hereby unanimously declare, that  
 ‘we are resolved to support him with our  
 ‘interest, at next general election, as we judge  
 ‘him a proper person to represent our district  
 ‘of

‘ of boroughs in Parliament; and we have  
‘ ordered our clerk to give him an extract of  
‘ this our resolution accordingly.’

Soon after this, and upon receiving advice that the transaction was illegal, the bills were delivered up to the acceptor, and the obligation which had been granted by the two magistrates, when they received them, was restored. This notwithstanding, a complaint was preferred for setting aside the subsequent election of magistrates and counsellors, which took place at Michaelmas 1767. This complaint was founded upon the transaction with regard to the bills; and although it was pleaded, *1mo*, That such transaction had no relation whatever to the election of magistrates and counsellors, and only respected the vote of the borough at the election of the member to serve in parliament; And, *2do*, That it had been done away immediately upon its being discovered that it was illegal; the court sustained the complaint, and, upon a proof, reduced the election \*.

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\* 11th March 1768, James Alexander, and others, *contra* Thomas Winterrup, and others.

This mode of bribery, by giving or promising something to a corporation in general, must always operate a total reduction of the election. The same must likewise happen, when a majority of the electors are bribed. But what will be the consequence, if only a few individuals are bribed, and a majority of uncorrupted electors join with them in voting for the same magistrates and counsellors? In such a case, it cannot be said that the election has been brought about by undue influence. It would, therefore, seem hard to deprive those of their freehold, who had acted *bona fide*, or to disfranchise the borough on account of the transgression of a few of the former council. It is highly just and reasonable to lay aside the votes of the corrupted, both bribers and bribed. But, if there still remain a majority of sound votes in favour of the election, it ought not, in justice, to be affected by their offences. This point occurred in the case of Brichen in 1726. In the election of new counsellors for the ensuing year, the votes stood, six to four. One of the six immediately acknowledged that  
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he had been bribed by one of the persons elected, and that an obligation had been taken from him to vote accordingly. Upon this ground, the minority insisted in a total reduction of the election, as brought about by bribery and corruption; but the court confined the challenge within proper bounds, and only 'found bribery relevant to annul 'the votes of the bribers and bribed \*.' The same principle was assumed, in determining a complaint brought against the election of the magistrates and counsellors of the borough of Killrenny, made in 1765 †.

But, if the magistrates elected by the majority are liable to be set aside on account of bribery, the whole election must in all events fall to the ground, because there can be no council without a magistracy. In the case of Inverkeithing, determined in 1761, the constituent members in the first step of election were twenty-five, of whom, fourteen voted on the

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side

\* 14th January 1727.

† January 1767, David Fowler and James Miller *contra* Andrew Baxter, and others.

side of Admiral Holburn's party, and eleven on the side of Captain Haldane. The latter challenged the election made by the former, on the heads of force and bribery; and, at the same time, insisted, that the persons voted for by themselves should be declared legally elected. The force being proved, and bribery brought home to a few, the election made by the majority was totally set aside; but, as the minority had voted Captain Haldane, who was proved guilty of bribing, to be provost, and two persons to be bailies who had been actually bribed, they were held to be thereby disqualified; and, of course, the election made by the minority could not be declared \*.

It has been maintained, that a bribe given to a wife to prevail with her husband to vote in a certain way, should be sufficient to set aside the husband's vote, although he was totally ignorant of the bribe given to her. But this seems unjust. The person who gave the

\* 11th March 1761, Captain Robert Haldane, and others, *contra* Admiral Francis Holburn, and others.



the bribe will, no doubt, be disqualified; but it would be hard to forfeit the husband's right, on account of the offence of his wife, to which he had no access.

We have seen that, by the statute of the 2d of George II. c. 24. certain penalties and disabilities are imposed, not only upon those who receive or take money, but even upon those who ask it for their votes, in elections of members of parliament. Hence it has been questioned, Whether those who ask money for their vote in the annual election of magistrates and counsellors, but do not receive it, ought to be set aside? But, although a person, by asking, discovers a corrupt inclination, and may therefore be a proper object of punishment upon conviction, still he cannot be said to be actually corrupted, unless he receive; and, although he vote for the person from whom he asked, it cannot be said that he did so from undue influence, after meeting with a refusal. Besides, as all penal laws ought to be most strictly interpreted, so the statute now in question relates only to the elections of members of parliament,

ment, or of commissioners for chusing bur-  
gesses, but not to the elections of magistrates  
and counsellors of boroughs; and, even in  
the oath which this very statute requires to  
be taken by voters at elections of members  
of parliament, no mention is made of asking.  
Neither is there a single word relative to  
asking, in the oath introduced by the act of  
the 16th of George II. which includes the  
case of money, or promises given for the  
benefit of a borough, as well as money gi-  
ven, or promises made, to particular elec-  
tors \*.

It

\* I deliver these observations, however, with much  
diffidence; because I have been informed, that a great  
judge expressed different sentiments upon the point in a que-  
stion relative to the reduction of an election of magistrates  
and counsellors, a few years ago. If, indeed, any circum-  
stances appear, from which it may be gathered, that the  
refusal was only made, in order to guard against an ob-  
jection, and that the asker trusted to the honour of the  
candidate, and expected that his request would still be com-  
plied with, the case is different from that which I meant  
to state. There he acts under an undue influence; and,  
on that account, his vote may, perhaps with justice, be  
set aside.

It has been often set up as a defence against complaints for reducing elections made by a corrupt majority, that the complainers were barred from insisting *personali exceptione*, by being themselves equally guilty of corruption. A defence of that sort ought not, however, to be sustained. The law allows any constituent member of the meeting to complain; the complaint must, therefore, proceed, and the election, if the fruit of bribery, must be set aside. But the election made by the complainers will not in that case be declared.

It has been made a question, Whether any of those who are called as defenders to a complaint for reducing an election of magistrates and counsellors, can be brought as witnesses upon the part of the complainers? and the court of session has frequently found, that they may be called, and must give evidence, with regard to what they know of others; but that they are not obliged to answer to what may infer turpitude against themselves.

Y 4

When

When an election of magistrates and counsellors is reduced, or, by reason of disturbances in the country, or some other cause, could not be made at the usual time, no new election can take place till the king grant a warrant for that purpose. These warrants are of different kinds, according to his Majesty's pleasure at the time. Sometimes the burgeses in general are allowed a poll-election; at other times, the magistrates and counsellors of the former year are appointed to name the new magistracy and council; and, in the case of the town of Perth, in 1716, the power of nomination was committed to the former magistrates alone, without the concurrence of the council.

In 1745, there was no election of magistrates and counsellors made in the borough of Montrose, the rebels being then in possession of that part of the country. Upon the 16th of June 1746, a warrant was granted by his late Majesty in council, ordering the magistrates and counsellors for the former year to proceed, on the 10th of July, to the election of others, in the same manner they ought

ought to have done, if they had not been prevented by the rebellion, and appointing the persons so elected to serve till the ordinary time of the annual election. Before the diet of election came, three of the council were apprehended on suspicion of treasonable practices, and committed to the tolbooth of Perth, in virtue of a warrant issued by the late Duke of Cumberland; and, by their absence, the party which otherwise would have been the minority carried the election. This appeared from the declarations of the imprisoned counsellors, which were produced at the election; and a complaint having been preferred to the court of session, setting forth, that the warrant for imprisonment had been impetrated upon a false information, fraudulently exhibited to his Royal Highness, in order that these three electors might be detained from the meeting, and therefore praying, that the election made by the majority should be reduced, and the election made by the complainers should be declared; an objection was moved to the jurisdiction of the court; and it

was



was pleaded, That, as the election had been made in virtue of a warrant from the king in council, its validity was not cognoscible in any court of law. In answering this objection, it was admitted, that, when the king appoints a poll-election, and names commissioners to take the poll, and to make a report to his Majesty in council, the courts of law cannot interfere; but it was pleaded, that the case was very different, when his Majesty simply authorised the former council to chuse a new council, that being in effect only a prorogation of the diet of election. This distinction was approved of by the bench, where it was observed, that, in the particular case then before the court, the old council were not made judges, but electors, which entirely distinguished it from that of a poll-election, where certain persons are appointed commissioners, to take the votes of those who claim to poll, and to judge how far such persons have a right to vote, in terms of the warrant. It was likewise, in this case, objected, that summary complaints were only competent against annual elections;

elections; but to this it was held as a sufficient answer, that the meaning of the term 'annual election,' is the election made for such and such a year, though not made at the ordinary time\*.

When a warrant is granted for a poll-election, it is generally directed to the sheriff of the county within which the borough lies, and to the sheriffs of the two neighbouring counties†.

## S E C T I O N II.

### *Of the Manner of electing the Representatives of the Boroughs.*

**E**ACH sheriff to whom a writ is issued must, immediately upon its coming to his hands, indorse upon the back of it the day

\* 17th February 1747, James Coutts, and others, *contra* David Doig, and others.

† The reader will find a copy of the warrant for a poll-election, in the borough of Anstruther-Wester, in the Appendix, No. 11.

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day he receives it; and, within four days after, must make out a precept to each borough within his jurisdiction, reciting the contents and date of the writ, and commanding each of them to elect a commissioner, and to order such commissioner to meet at the presiding borough of the district (which must be named in the precept) upon the thirtieth day after the test of the writ, or the next day, if it fall upon a Sunday, for the purpose of chusing a burgess to serve in parliament. The sheriff must likewise cause these precepts to be delivered within the four days to the chief magistrates residing in the boroughs for the time; and, if he neglect his duty in these particulars, he, for every offence, forfeits L. 100 Sterling, to any magistrate of the borough, whose precept has not been timeously delivered, who shall sue for the same\*.

The magistrate to whom the precept is delivered must, in like manner, indorse upon  
within

\* 16to Annæ, cap. 6. § 5. 7mo Geo. II. cap. 16. § 5. 6to Geo. II. cap. 11. § 40. A Form of the sheriff's precept is to be found in the Appendix, No. 12.

its back the day it came to his hands, and, within two days after, must call a meeting of the council of the borough, by giving notice personally, or leaving notice at the dwelling house of every counsellor then residing within it †. And, in case he neglect to do so, he, for every offence, forfeits L. 100, to any magistrate or counsellor of the borough who shall sue for the same ‡.

The council being thus called, appoint a peremptory day for the election of a commissioner to go to the presiding borough of the district, to chuse a burghers to serve in parliament. Two free days must, however, intervene, between the meeting of council which appoints the day for electing the commissioner, and the day on which such election is to be made §.

The council being met upon the day appointed, the precept is produced and read; after which the act of the 2d of George II.  
is

† 7mo Geo. II. cap. 16. § 5. 16to Geo. II. cap. 11.  
§ 41.

‡ 16to Geo. II. cap. 11. § 42.

§ 16to Geo. II. cap. 11. § 42.

is likewise publicly read. The magistrates and counsellors next qualify to government, by taking and subscribing the oath of allegiance, and subscribing the assurance, and by taking and subscribing the oath of abjuration, if put by any member of the meeting.

This being done, the clerk of the borough takes the following oath, which is administered to him by any of the magistrates, or, in their absence, by any two of the council:

‘ I A. B. do solemnly swear, That I have not,  
 ‘ directly or indirectly, by way of loan, or other device whatsoever, received any sum or  
 ‘ sums of money, office, place, or employment, gratuity or reward, or any bond,  
 ‘ bill, or note, or any promise of any sum or  
 ‘ sums of money, office, place, employment,  
 ‘ or gratuity whatsoever, either by myself,  
 ‘ or any other to my use, or benefit, or advantage, to make out any commission for  
 ‘ commissioner for chusing a burghers; and  
 ‘ that I will duly make out a commission to  
 ‘ the commissioner who shall be chosen by a  
 ‘ majority of the town-council assembled,  
 ‘ and



‘and to no other person. So help me  
‘God\*.

The following oath must likewise be taken, by every member of the meeting, if required by any one member present. ‘I A.  
‘B. do solemnly swear, that I have not, directly or indirectly, by way of loan or other device whatsoever, received any sum, or sums of money, office, place, employment, gratuity, or reward, or any bond, bill, or note, or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either for myself, or any other to my use, or benefit, or advantage, or to the use, benefit, or advantage of the city or borough of which I am a magistrate, counsellor, or burghers, in order to give my vote at this election. So help me God†.’

These preparatory steps being over, the magistrates and counsellors present give their votes; and these votes being severally marked by the clerk, the minutes conclude, by the  
council

\* 16to Georgii II. cap. 11. § 35.

† 16to Georgii II, cap. 11. § 34

council finding the person, in whose favour the majority stands, to be their commissioner, and by ordering the clerk to draw up a commission to such person, and to sign it, and to affix to it the common seal of the borough\*.

The legislature has found it necessary to guard against abuses in the clerks of the royal boroughs, not only by oaths, but by the terror of severe penalties. It is accordingly provided, by the act of the 16th of George II. that, if the common clerk of any borough shall neglect, or refuse, duly to make out and sign a commission to the commissioner elected by the majority, and affix thereto the seal of the borough, or shall make out and sign a commission to any other person, or affix the common seal of the borough thereto, he shall, for every such offence, forfeit L. 500 Sterling to the commissioner elected by the majority, and shall also suffer imprisonment for the space of six calendar months, and be for ever after disabled to hold or enjoy

\* A form of a commission is in the Appendix, No. 13.

joy the office of common clerk of the borough, as effectually as if he were naturally dead \*.

This statute also imposes the like penalty upon every person, other than the common clerk of the borough, who takes it upon him to act as such, in the election of a commissioner to chuse a burges to serve in parliament, and makes out and signs, or affixes the seal of the borough to a commission in favour of any other person than the commissioner appointed by the majority †. This penalty is likewise given to the commissioner elected by the majority; but, if the commission be made out to him, though signed by another person than the clerk of the borough, the penalty will not be incurred, though, as shall be shown immediately, such commission may with propriety be objected to at the election of the burges to serve in parliament.

It is not necessary that the commissioner be a resident, or a trafficking merchant with-

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in

\* 16to Georgii II. cap. 11. § 30.    † Id. ibid.

in the borough, or that he be in possession of any burgage-lands or houses holding of it; nor need any such qualifications be ingrossed in the commission \*.

The commissioners from the several boroughs of the district meet together upon the thirtieth day after the test of the writ, in the town-house of the presiding borough, betwixt eleven and twelve before noon, and, after production of the precepts from the sheriffs, and reading the act of the 2d of George II. the commissioner from the presiding borough administers the oaths to government to the common clerk of that borough, who acts as clerk to the meeting, and makes the return to the sheriff. The clerk next takes the following oath: ‘ I A. B. do solemnly swear,  
 ‘ That I have not, directly or indirectly, by  
 ‘ way of loan, or other device whatsoever,  
 ‘ received any sum or sums of money, office,  
 ‘ place, employment, gratuity, or reward, or  
 ‘ any bond, bill, or note, or any promise of  
 ‘ any sum or sums of money, office, place,  
 ‘ employment,

\* 16to Georgii II. cap. 11. § 29.

‘ employment, or gratuity whatsoever, ei-  
‘ ther by myself, or any other to my use,  
‘ or benefit, or advantage, to make any re-  
‘ turn at this election of a member to serve  
‘ in parliament; and that I will return to the  
‘ sheriff or steward the person elected by the  
‘ major part of the commissioners assembled,  
‘ whose commissions are authenticated by  
‘ the subscription of the common clerk and  
‘ common seal of the respective boroughs of  
‘ this district. So help me God\*.’ If the  
clerk neglect, or refuse to take this oath, he  
is thereby disabled from acting as clerk to  
the meeting; and the commissioners are, in  
that event, empowered and required to chuse  
another clerk, who becomes immediately  
invested with all the powers and authority  
in the meeting, and in returning the member  
chosen by that meeting, which, by law, are  
competent to the clerk of the presiding bo-  
rough †.

The clerk being thus properly qualified  
to act, the commissioners produce their re-

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spective

\* 16to Georgii II. cap. 11. § 35.

† 16to Georgii II. cap. 11. § 36.



spective commissions, which are read; and, if objections are made to any of them, or any protests are taken, these objections or protests ought regularly to be marked in the minutes. If any person to whom no commission has been granted in manner above mentioned, appear, and insist that he was duly elected a commissioner from any borough of the district, he must be admitted to the meeting, and, upon his taking the oaths required by law, which the clerk is empowered to administer, and declaring for whom he would have voted, if he had got an authentic commission, the clerk must insert such declaration in the minutes. This is ordered, that, in case of any unfair play in making out the commissions, it may be known in the house of commons for whom the commissioner appointed by the majority of the town-council would have voted, had the clerk of the borough performed his duty, by making out, signing, and affixing the seal of the borough to a commission in his favour. But the clerk of the presiding borough, who is the returning-officer, is not  
left

left at liberty to pay any regard to such declarations, however much he may have reason to be convinced that the person who so declares was truly chosen by the majority of the council, and that it was through the fault of the clerk alone that he was prevented from producing a proper commission. This returning officer is merely ministerial; he has no power to judge of what is right or wrong; he must literally obey the dictates of the statutes, and is debarred from admitting the votes of any but those who produce commissions authenticated by the subscription of the common clerk and the common seal of the boroughs within the district. He must return to the sheriff the person elected by the major part of the commissioners assembled, whose commissions are so authenticated; and, if he neglect, or refuse to return such person, or if he return any other person, he, for every such offence, forfeits L. 500 Sterling to the candidate elected by the majority of the commissioners, and is also subjected to six calendar months imprisonment, and becomes for ever after disabled to hold or enjoy his office of clerk.

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of the presiding borough, as if he were naturally dead \*.

The

\* 16to Georgii II. cap. 11. § 30. I shall here mention a case, which, though it never received a determination, was the subject of much conversation at the time it happened. In the election of a burges to serve in parliament for the district composed of the boroughs of Anstruther-Easter, Anstruther-Wester, Pittenweem, Crail, and Killyrenny, upon a vacancy that happened in 1765 by the death of Sir Harry Erskine, three of these boroughs were in the interest of Mr Robert Alexander, and the other two in the interest of Sir John Anstruther. Of the boroughs which favoured Mr Alexander, Pittenweem was one; and, at the election of a commissioner for that borough, 17 members of the town-council voted for him, and three for Mr Durham of Largo; but the whole twenty signed an order to David Anderson, the clerk of the borough, to make out a commission immediately in Mr Alexander's favour. A commission was accordingly extended, and signed by the clerk, in presence of the council; but, when he was desired to affix the common seal of the borough to it, he pretended that the seal had been abstracted from him. Upon this the council, knowing that Anderson and his family were strongly in the interest of Sir John Anstruther, and suspecting that some trick was intended, caused Anderson affix to the commission an impression of the town's seal, which was then taken from a blank burges-ticket for that purpose.—

The

The commissioners from the several boroughs, before proceeding to give their votes in the election of a burges to represent the di-

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strict

The seal of the borough, which had been put into the hands of one of Sir John Anstruther's friends, was soon after restored to the magistrates; but, Anderson having absconded and kept out of the way, the magistrates and town-council did, upon the 16th of January 1766, deprive him of his office, as guilty of breach of trust, and appointed William Walker to be clerk in his place. Mr Walker accepted of the office; and having taken into his custody the seal of the borough, and the records of council, he was ordered to extract from the minutes of election, and to give out to Mr Alexander, one or more commissions, if he should be required so to do, and to sign such commissions, and affix the seal of the borough to them. Mr Walker was likewise appointed to affix the seal of the borough to the commission in Mr Alexander's favour, which had formerly been signed and sealed by Anderson. This was accordingly done; and, in order to remove all pretence for cavil or dispute, a second extract or commission was likewise made out from the minutes of election, and was signed and sealed by Mr Walker in presence of the meeting of the council.

The meeting of the commissioners for electing the burges to serve in parliament was held at Anstruther-East-er, which was the presiding borough, upon the 17th of January 1766. Mr Alexander attended that meeting, and producing both commissions, voted for himself. The  
commissioners

strict in parliament, must take the oaths to government, and likewise the oath of bribery introduced by the act of the 2d of George II.  
if

commissioners from Anstruther-Wester and Kilrenny, likewise voted for him; and the commissioners from the other two boroughs voted for Sir John Anstruther. No other commission was produced from the borough of Pittenweem, but several objections were made by the commissioner from the presiding borough to both the commissions produced by Mr Alexander. To these objections it was answered in general, that the clerk of the presiding borough was bound by his oath and the duty of his office, to sustain the vote of every person who produced a commission, authenticated by the subscription of the common clerk, and by the seal of the borough by whom such commission was granted, and as Mr Alexander had undoubtedly produced a commission so authenticated, his vote could not be rejected. This notwithstanding, the commissioner from the presiding borough claimed a casting or decisive vote, as if there had been an equality, and having given that vote in favour of Sir John Anstruther, James Christie writer in Edinburgh, who had only two days before been appointed common clerk to the presiding borough, upon the resignation of the former clerk, (whose scruples could not be overcome, notwithstanding his having received favours upon former occasions from Sir John Anstruther's family) thought proper to return Sir John to the sheriff, who, in conformity to his duty, annexed that return to the writ.

Mr



if so required ; after which they give their votes, and the minutes being signed by the preses and clerk, the meeting is thereupon dissolved.

I have already mentioned, that, by the act of the Scotch parliament 1707, it was ordered, that, when the votes of the commissioners of boroughs, met to chuse representatives from their several districts, should be equal, the president of the meeting should have a casting or decisive vote, besides his vote as commissioner of the borough from which he is sent, and that the commissioner from the eldest borough should preside in  
the

Mr Alexander not only petitioned the house of commons, but likewise preferred a complaint to the court of session against Christie, upon the clause of the statute of George II. above taken notice of. He was, however, afterwards prevailed with to withdraw his petition to the house of commons; and no judgement was pronounced in the complaint against Christie. But every one who will attend to the printed pleadings in that case, must be satisfied that Christie had been guilty of a false return, and had of course subjected himself to the penalty and disqualification inflicted by the statute upon such offenders.

the first meeting, and the commissioners from the other boroughs in the district preside afterwards by turns, in the order they were called in the rolls of the parliament of Scotland. By the British statute 6to Annae, c. 6. it was likewise enacted, that, in the case of a vacancy happening during the time of parliament, by death or disability, the borough which presided at the election of the deceased or disabled member should preside at the new election. No provision was, however, made, in case of the absence of the commissioner from the presiding borough: It was therefore ordered, by the act of the 16th George II. that, if the commissioner from the presiding borough should be absent, or refuse to vote in the election of a burghers, the commissioner from the borough which presided at the last election, and, in the case of his absence or refusal to vote, the commissioner from the borough which presided at the election preceding the last, and, in case he should likewise be absent, or refuse to vote, the commissioner from the borough which presided last but two, should have, in these

these respective cases, besides his own vote, the casting or decisive vote.

There is no express enactment of the legislature with regard to a case which happened a few years ago, and may happen again. We have already seen, that the election of magistrates and counsellors of the town of Jedburgh, made at Michaelmas 1767, was set aside by the court of session, upon the 11th of March 1768. That borough could therefore send no commissioner for choosing a burghers at the ensuing general election, which took place soon after; and as it was its turn to preside, if it had been in a capacity to appoint a commissioner, great doubts arose, not only with regard to the place where the election should be made, but also, whether the commissioner from the borough of Haddington, which had presided during the former parliament, or the commissioner from Dunbar, whose turn it was to preside after Jedburgh, should have the casting vote in case of an equality, a question of considerable importance to the candidates, Dunbar and North-Berwick being

ing in the interest of Colonel Warrender, and Haddington and Lauder in the interest of Captain Maitland.

Dunbar contended, that the borough of Jedburgh was annihilated by the judgement of the court of session, setting aside the election of its magistrates and counsellors, and that, of course, the right of presiding fell to devolve on Dunbar, as the next in rotation, and demanded of the sheriff of East-Lothian to issue his precepts accordingly. Haddington, on the other hand, maintained, that, though the council of Jedburgh was reduced, yet the borough itself still subsisted, and fell to be the place of election, and the clerk thereof to be the returning officer; and that, in the absence of a commissioner from that town, the right of presiding devolved on the commissioner from Haddington, as being the last presiding borough, in terms of the act of the 16th of George II.

The sheriff of East-Lothian, in the precepts which he issued to the three boroughs lying within his jurisdiction, viz. Dunbar, Haddington, and North-Berwick, named  
Dunbar

Dunbar as the presiding borough ; but the sheriff of Berwick-shire, within which Lauder is situated, did not name the presiding borough in his precept ; and contented himself with requiring the council, to whom the precept was directed, to name the presiding borough and place of election in the commission to be granted by them.

Each of the boroughs of Haddington and Lauder named commissioners to go to Jedburgh, upon the 30th day after the test of the writ, and there to elect a burgess to serve in parliament. But, as they understood that Dunbar and North-Berwick intended to make an election at Dunbar, they likewise appointed commissioners to go there, and vote at such election under protest ; and, upon the supposal, that, if the place of election could be at all altered from Jedburgh, it fell to be at Haddington, they also appointed other commissioners to attend at that borough, and to make an election there on the same day.

Three elections were accordingly made upon the 11th of April 1768. Commissioners from Haddington and Lauder met, both at  
Jed-



Jedburgh and Haddington; and, at both these places, elected Captain Maitland to be member for the district. The common clerk of the town of Jedburgh having refused to act, the commissioners chose another person to officiate in his place; and a return having been made by the clerk so elected of Captain Maitland, as the member for the district, the sheriff of Roxburgh, within whose jurisdiction Jedburgh lies, annexed that return to the writ which had been issued to him from chancery. At Haddington the common clerk acted, and likewise returned Captain Maitland to the sheriff of East-Lothian.

At Dunbar, commissioners attended from the whole four boroughs; and the commissioners from Haddington and Lauder voted, under protest, for Captain Maitland, as did the commissioners of Dunbar and North-Berwick for Colonel Warrender. Each of the boroughs of Haddington and Dunbar likewise claimed the casting or decisive vote; but the common clerk of Dunbar returned Colonel Warrender as duly elected, and the  
sheriff

sheriff of East-Lothian annexed that return to his writ, without paying any regard to the return made by the common clerk of Haddington.

Captain Maitland preferred a petition to the house of commons, complaining of the return of Colonel Warrender; but a compromise having afterwards taken place, that petition was withdrawn, and Colonel Warrender sat as member for the district, until his seat was vacated by his accepting a place, when a writ was issued for a new election.

Colonel Warrender again appeared as a candidate; but was opposed by Captain Charles Ogilvie, who had obtained the interest of the two boroughs of Haddington and Lauder.

Upon this occasion, no commissioners were sent to Jedburgh or Haddington, as at the general election; but, at the meeting for election held at Dunbar, the commissioner from Haddington, who, along with the commissioner from Lauder, voted for Captain Ogilvie, again claimed the casting vote; but the common clerk of Dunbar having, as formerly, returned Colonel Warrender,

render, the sheriff annexed that return to the writ. Captain Ogilvie petitioned the house of commons; and the question having been deliberately tried before a committee of the house, named in terms of the 10th of his present Majesty, cap. 16. \* Colonel Warrender was found to be duly returned.

The

\* Formerly, all controverted elections were determined by the house of commons in a full meeting of the house; but, sundry inconveniencies arising therefrom, a new method of procedure was laid down by the act now quoted. When a petition is presented, complaining of an undue election or return, a day is appointed for taking it into consideration; and how soon there are a hundred members in the house upon that day, the doors are locked, and the names of all the members in the house, written or printed on distinct pieces of parchment or paper, being put, in equal numbers, into six boxes or glasses, the clerk draws from these boxes or glasses, alternately, these pieces of parchment or paper, until forty-nine names of the persons then present be drawn. This being done, the petitioners, or their agents, name one, and the sitting members, or their agents, another, from among the members present, to be added to the forty-nine so drawn by lot. The door of the house is then opened, and lists of the forty-nine members, so chosen by lot, being given to the petitioners, or their agents, and the agents for the sitting members, they immediately withdraw, and alternately

The procedure subsequent to the meeting of the commissioners from the several boroughs of the district, is similar to that which takes place in the election of representatives of shires. The clerk of the presiding borough returns the person elected by the majority of the commissioners to the sheriff within whose jurisdiction that borough is situated. That return must be annexed by the sheriff to the writ. And, in the event of his neglecting, or refusing to do so, or of his annexing to the writ a return made by any other person, he, for every such offence, forfeits the sum of L. 500 Sterling to the candidate returned by the

A a

clerk

ly strike off one of the forty-nine, until the number be reduced to thirteen; after which, the thirteen so remaining, together with the two members nominated as above, are sworn at the table, to try the matter in the petition referred to them, and to give a true judgement, according to the evidence. A day is then fixed by the house for the meeting of this select committee, which must be within twenty-four hours of their appointment, unless a Sunday or Christmas-day intervene; and whatever determination they make, is final between the parties to all intents and purposes.

clerk of the presiding borough, to be recovered by him, or his executors, by summary complaint before the court of session.

Hitherto I have only mentioned what takes place in the different districts, consisting of several boroughs; but, as the city of Edinburgh does itself send a member to parliament, the process there is shorter. They have no occasion to chuse a commissioner for electing the member. The sheriff of the county, by his precept, directed to the magistrates and town-council, requires them to elect their representative, and the town-clerk returns the person chosen by them to the sheriff \*.

## S E C-

\* The form of the sheriff's annexing to the writ the return made by the clerk of the presiding borough, is to be seen in the Appendix, No. 14.



### S E C T I O N    III.

*Of the Qualifications necessary to entitle a  
Person to be elected a Burgeſs to ſerve in  
Parliament.*

**W**E have ſeen, that commiſſioners  
from ſhires muſt be poſſeſſed of a  
freehold within the counties which they re-  
preſent. There is, however, no neceſſity  
that a perſon who repreſents the city of E-  
dinburgh, or any of the fourteen diſtricts  
into which the other boroughs are divided,  
be poſſeſſed of any property within theſe  
boroughs.

By an act of the 11th parliament of  
James VI. \* it was ordained, ‘ That there  
‘ ſhall be na confuſion of perſones of the three  
‘ eſtates ; that is to ſay, na perſon ſhall take  
‘ upon him the function, office, or place of  
‘ all the three eſtates, or of twa of them ;  
‘ bot ſhall only occupy the place of that ſelfe

A a 2

‘ eſtate

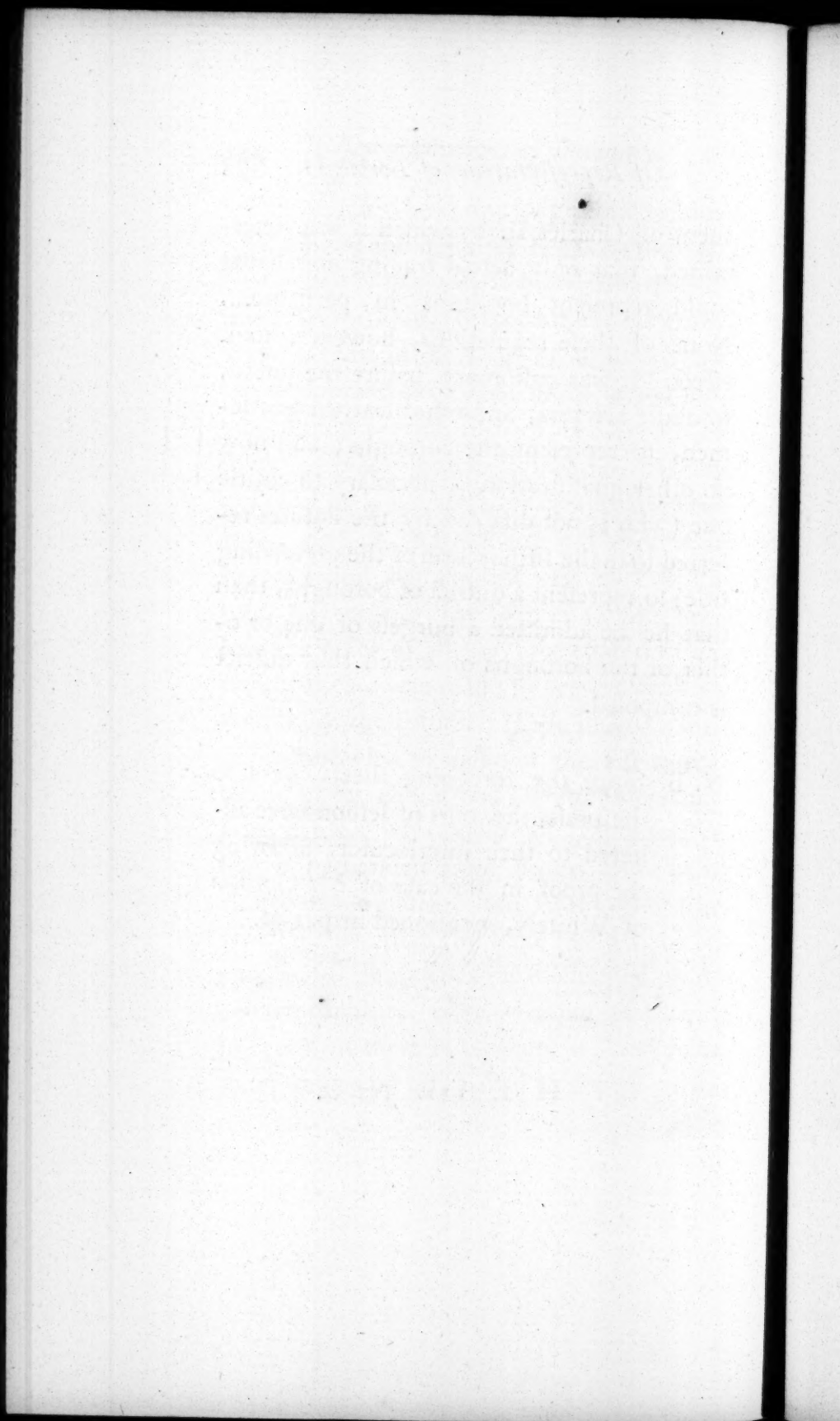
\* Cap. 33.

‘ estait quhairin he commonly professes him-  
 ‘ self to live, and quhairof he takes his style.’  
 Sir George M’Kenzie, in his observations on  
 this act, says, that, parliament having grown  
 very factious in the time of Queen Mary,  
 the popish and protestant party contending  
 who should prevail, such of the popish bi-  
 shops, or other church-dignataries, as were  
 possessed of lands and heritages claimed two  
 votes, one as churchmen, and another as  
 barons; and that the first part of this sta-  
 tute, discharging any person to take upon  
 him the office of all the three estates, or any  
 two of them, was made to prevent such at-  
 tempts for the future. He is indeed a little  
 diffculted what to make of the last words;  
 but supposes, that it was thereby intended to  
 keep barons, who could not get themselves  
 sent to parliament from shires, from being  
 chosen as burgeses. The same author like-  
 wise tells us, that, by some late acts of bo-  
 roughs, all burgeses were discharged, under  
 certain penalties, from electing gentlemen  
 to represent them in parliament; and refers  
 to an unprinted act, passed in the 3d parlia-  
 ment

ment of Charles II. by which it was determined, that only actual trading merchants could represent boroughs in parliament. None of these regulations, however, took effect. It was customary, before the union, to chuse lawyers, and other learned gentlemen, to represent the boroughs; and now no other qualification is necessary to entitle one (who is not disabled by the statutes referred to in the fifth section of the preceeding title) to represent a district of boroughs, than that he be admitted a burghers of one or other of the boroughs of which that district is composed.

N. B. Since the foregoing sheets went to the press, the court of session have adhered to their interlocutor, allowing the proof in the case of Mr Gordon of Whitely, mentioned in p. 130.

T H E E N D.



# A P P E N D I X.

## N U M B E R I.

LIST of all the ROYAL BOROUGHS in Scotland, as divided into their several Classes or Districts; in which the Precedence of the Boroughs of each District is observed, according to the Order in which they were called in the Rolls of the Parliament of Scotland.

### EDINBURGH.

#### District 1. Tain

Dingwall

Dornoch

Wick

Kirkwall.

#### 2. Inverness

Nairn

Forres

Fortrose.

#### 3. Elgin

Banff

Cullen

Kintore

Inverury.

#### 4. Aberdeen

Montrose

Brechin

Aberbrothock

Inverbervie.



- |   |  |
|---|--|
| 5. Perth<br>Dundee<br>St Andrew's<br>Coupar<br>Forfar.                        | 10. Haddington<br>Jedburgh<br>Dunbar<br>North-Berwick<br>Lauder. |
| 6. Anstruther-Easter<br>Pittenweem<br>Crail<br>Anstruther-Wester<br>Kilrenny. | 11. Linlithgow<br>Selkirk<br>Lanark<br>Peebles.                  |
| 7. Dyfart<br>Kirkcaldie<br>Burntisland<br>Kinghorn.                           | 12. Dumfries<br>Kirkcudbright<br>Annan<br>Lochmaben<br>Sanquhar. |
| 8. Stirling<br>Inverkeithing<br>Dunfermline<br>Culrofs<br>Queensferry.        | 13. Wigton<br>Whithorn<br>New-Galloway<br>Stranrawer,            |
| 9. Glasgow<br>Dunbarton<br>Renfrew<br>Rutherglen.                             | 14. Ayr<br>Irvine<br>Rothsay<br>Inveraray<br>Campbelton.         |

NUMBER II.

FORM of a Proxy by a Peer.

I by virtue of the power  
 allowed by act of parliament to the peers of Scotland, to make proxies for nominating and appointing peers whom they shall judge fittest to sit and vote in the house of peers of the parliament of Great Britain, and in obedience to his Majesty's proclamation, charging and commanding all the peers of Scotland to meet at Holyroodhouse in Edinburgh on next, to nominate and chuse the sixteen peers for Scotland, to sit and vote in the house of peers of the ensuing parliament of Great Britain, do, by these presents, nominate and appoint to be my proxy or attorney to the effect under-written, giving, granting, and committing full power and commission to my said proxy, for me, and in my name, to appear at the ensuing meeting of the peers of Scotland, at Holyroodhouse aforesaid, for electing sixteen peers of Scotland, to sit and vote in the house of peers of the ensuing parliament of Great Britain, and to do every thing relating thereto, as fully, and in every respect, as I might or could do myself, were I personally present. In witness whereof, I have subscribed these presents, wrote on stampd paper, by at  
 the day of  
 before these witnesses, &c.

NUMBER



N U M B E R IV.

**FORM of a Certificate by a Sheriff, of a Peer's having qualified himself to grant a Proxy, or send a signed List.**

I depute of the sheriffdom of                      do  
certify and declare to the peers of Scotland, to be assem-  
bled in his Majesty's palace of Holyroodhouse at Edin-  
burgh, upon the                      day of                      next,  
betwixt the hours of twelve and two in the afternoon, to  
nominate and chuse the sixteen peers to sit and vote in  
the house of peers in the ensuing parliament of Great  
Britain, That the Right Honourable  
                        appeared before me in a fenced court, held  
by me at                      this day, where I did tender  
to him the oaths of allegiance and supremacy, and decla-  
ration against popery on paper, and oath of abjuration  
on parchment, which oaths and declaration the said  
                        did repeat, swear, and subscribe;  
and I have herewith returned the said oaths and declara-  
tion so taken and subscribed as said is, as by the act of  
parliament made in that behalf is directed and appointed.  
In witness whereof, I have signed and sealed these pre-  
sents, at                      the                      day of  
                        and of his Majesty's reign the                      year.

NUMBER

## N U M B E R V.

CERTIFICATE or Return by the Clerk-Register, or Clerks of Session of the Sixteen Peers chosen.

AT Holyrood-house in Edinburgh, the  
 day of in obedience to his Majesty's royal proclamation, of the date, at St James's, the  
 day of commanding all the  
 peers of Scotland to assemble and meet at this place this  
 day, between the hours of twelve and two in the afternoon,  
 to nominate and chuse the sixteen peers to sit and vote in  
 the ensuing parliament of Great Britain, which is to be  
 held on the day of next.  
 We and Esquires,  
 two of the principal clerks of session, by virtue of the  
 commission granted to us by the Right Honourable  
 clerk-register of Scotland, dated  
 and registered in the books of council and session  
 appointing us to officiate in his name at the  
 said meeting of the peers, do hereby certify and attest,  
 that, after the oaths and declaration, required by law  
 to be taken by the peers present, were administered  
 to them, and their votes, with those of the proxies,  
 and signed lists of the absent peers collected and examined,  
 [here the names of the sixteen peers are inserted]  
 were



were elected to sit and vote, in the house of peers, in the ensuing parliament of Great Britain. In witness whereof, we have signed and sealed these presents with our hands, in presence of the peers electors, place, and time above mentioned.

## N U M B E R VI.

COPY Warrant by Queen Mary to the Sheriff of Aberdeen in 1548, for extending or retouring all the Lands of that County.

MARY, by the grace of God, Queen of the Scots, to our sheriff of Aberdeen, and to his deputies, greeting, forsameikleas our dearest cousin, and tutor James Earl of Arran, Lord Hamilton, &c. protector and governor of this realm, and Lords of our secreit council, understanding that our auld enemies of England intend, the spring of this year, to invade our realm with all their force and power, whilk may not goodlie be resisted without an general tax of men and money, as have been thought most necessar, to be lifted off the haill estates of the same; whilk tax cannot be made till the time the said Lords know the value and extent of all the lands within our realm: Our will is herefore, and we charge you straitly, and command that,

that, incontinent thir our letters seen, ye pass with all diligence possible, and convene ane condign assyse of the most famous men within the bounds of your office, and retour be them all manner of lands lying within the same, as well kirk-lands as temporal lands, and the patrimony of our crown, and others being in their hands be reason of ward or otherwise; and that the said assyse be chosen and sworn thereto in manner following, viz. the lands that gives presently of yearly maill and duty four pounds to twenty shillings of old extent, general and universal, without any exception or regard to any retour passit a-before; and that ye bring and produce before us, our said tutor and governour, and lords foresaid, your retour, made in manner above written, to our borough of Edinburgh, the 20th day of January instant, under the pain of rebellion, and putting you to our horn; and give ye failzie therein, the day being past, ye be denounced our rebel and put to our horn. And on likeways, that ye command and charge the barons and landed men, dwelland within the bounds of our said sheriff-dome, to convene with you at sick day and place as ye shall appoint unto them, for making of the said retour, under the pain of rebellion. And, if they failzie therein, that ye denounce them that disobey our rebels, and put them to our horn, and escheat and inbring all their moveable goods to us, for their contempt, as ye will answer to us thereupon, to the execution of your office, delivering thir our letters, be you duely execute and indorfit, again to the bearer. Given under our signet, at Strivling the third day of January, and of our reign the seventh year 1548.

*Per Dominos Secreti Concilii, &c.*

NUMBER

N U M B E R VII.

**FORM of the Writ to the Sheriffs upon the calling of a Parliament.**

**G**EORGIUS, Dei gratia, Magnae Britanniae, Franciae,  
et Hiberniae, Rex, fidei defensor, Vicecomiti comi-  
tatus de Salutem. Quia de avifamen-  
to et assensu concilii nostri, pro quibusdam arduis et ur-  
gentibus negotiis, nos, statum et defensionem regni nostri  
Magnae Britanniae, et ecclesiae, concernentibus, quoddam  
Parliamentum nostrum, apud civitatem nostram Westmin-  
ster, die proximo fu-  
turi, teneri ordinavimus; et ibidem, cum praelatis, mag-  
natibus, et proceribus, dicti regni nostri, colloquium ha-  
bere, et tractatum; tibi praecipimus, firmiter injungendo,  
quod immediate, post debitam notitiam prius inde dan-  
dam, unum militem, gladio cinctum, magis idoneum et  
discretum comitatus praedicti. per libere tenentes ejusdem  
comitatus, qui electioni hujusmodi intererunt, secundum  
formam statuti in eadem casu editi et provisi, eligi facias.  
Tibi etiam praecipimus, quod de quolibet regali burgo  
comitatus praedicti. unum commissionarium, ad elegen-  
dum unum burgensem, pro classe, sive districtu, de discre-  
tioribus, et magis sufficientibus, libere et indifferenter, jux-  
ta formam statuti inde editi et provisi, eligi facias. Et no-  
mina eorundem militis et burgensis, qui tibi forent retor-  
nata







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provided. These are, therefore, intimating and making known to the haill freeholders and electors of the sheriffdom of \_\_\_\_\_ in pursuance of the said acts of parliament and writ issued forth to us: That they meet and convene at \_\_\_\_\_ upon \_\_\_\_\_ being the \_\_\_\_\_ day of \_\_\_\_\_ betwixt the hours of twelve and two of the clock in the afternoon, in \_\_\_\_\_ in order to elect their representative for the said shire to sit and vote in the house of commons of the parliament of Great Britain, which is to meet on the said \_\_\_\_\_ day of \_\_\_\_\_ next, and ordain intimation hereof to be made at the market-cross of \_\_\_\_\_ on a market-day following, and at the parish-churches within the shire the next Lord's day, and to be read by the precentors immediately after divine service in the forenoon; and thereafter affixed on the most patent door of the said churches. Given and subscribed at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ and of his Majestie's reign the \_\_\_\_\_ year

## N U M B E R IX.

FORM of the Execution of the above Intimation.

UPON the \_\_\_\_\_ day of \_\_\_\_\_ one thousand seven hundred and seventy \_\_\_\_\_ being a market-day, and market-time, betwixt the hours of \_\_\_\_\_ of

of eleven and twelve before noon; I A. B. sheriff-officer, past at command of the sheriff-depute of the sheriffdom of to the market-crofs of head-burgh of the sheriffdom thereof, and thereat, after my crying of three several Oyes's, and open proclamation, did publicly read the principal intimation and summons, intimating and summoning the respective freeholders within the said sheriffdom, to convene and meet upon that day, at the place, and to the effect therein, and within mentioned; and, after due proclamation, and public reading thereof, I affixed and left, at and upon the said market-crofs, a printed copy, whereof the within is a duplicate. This I did, before these witnesses, C. D. and E. F. both sheriff-officers, and hereto subscribing with me.

An execution must also be made and given in, bearing the officer's having delivered copies of the intimation to the precentors of all the parish-churches within the shire, and of their being affixed on the most patent door of the several churches.

## N U M B E R X.

FORM of the Sheriff's annexing to the Writ the Return made by the Clerk to the Freeholders.

The return is made in the form of an indenture between the sheriff and clerk, in the following manner:

**T**HIS indenture, made at in a full court or meeting of the sheriffdom thereof, holden the day of in the year of B b 2 the

the reign of our sovereign Lord George the Third, by the grace of God, King of Great Britain, France, and Ireland, betwixt an honourable man, A. B. Esquire, sheriff-depute (or substitute) of the said shire, upon the one part, and Mr C. D. clerk, elected to the effect under-written, by the electors or freeholders of the said shire, on the other part, witnesseth, that, according to the form and tenor of the brieve or writ of our sovereign Lord the King, annexed to this indenture, proclamation having been lawfully made at the market-cross of the borough of head-borough of the said shire of                      and at the respective parish-churches within the same, as the custom is; the electors and freeholders of the said sherrifdom, being met the day above-mentioned, in the  
of                      and those who were there present, being sworn and examined, according to the form, strength, and effect of the severall statutes made and provided thereanent, they unanimously elected and chose F. G. of H. knight, residing within the county, girt with a sword, habile, fit, and discreet, giving and granting to the aforesaid knight, full and sufficient power for himself and the whole community of the said shire, to do and consent to such things in parliament, as by the common council of the kingdom shall happen to be ordained, upon the affairs aforesaid specified in the said writ. In testimony whereof, to the one part of this indenture remaining with the said A. B. to be annexed to, and returned with the writ, he, the said A. B. and C. D. have set their hands and seals; and to the other part of the said indenture, remaining with the said C. D. for the use of the before mentioned shire, the said A. B. has also set his  
hand

hand and seal, place, day, month, and year of God, and king's reign aforefaid.

When there is only a return made to the ſheriff, of a member to repreſent the ſhire, there is wrote and ſigned by him upon the back of the writ, as follows: ‘ The execution of the within writ is contained in the indenture hereto annexed.’ If there is likewise a return of a burgeſs, the indorſement is in theſe words: ‘ The execution of the within writ is contained in certain indentures hereto annexed.’

N U M B E R X I.

COPY Warrant for a Poll-election in the  
Borough of Anſtruther-Wetter.

At the Court at St James's the 26th day of June 1767.

P R E S E N T,

The KING's Moſt Excellent Majeſty in Council.

**W**HEREAS there was ſome time ſince preſented to his Majeſty at this board, a petition of Robert Robb, and others, burgeſſes, heritors, and inhabitants of the borough of Anſtruther-Wetter in North Britain, praying, that his Majeſty would be graciously pleaſed to grant warrant for making an election of magiſtrates and coun-

B b 3

fellors

fellors for the said borough, by a general poll of such resident burgeses, heritors, and inhabitants, paying and liable in public burdens within the same; and likewise a petition of Robert Hunter, and other burgeses and heritors of the same borough, praying, that his Majesty would be graciously pleased to order a warrant in council, for restoring the magistracy and town-council of the said borough, by a poll election of the burgeses resident in the borough, and heritors bearing part of the public burdens, excluding honorary burgeses, servants, and pensioners of the town: His Majesty having taken the same into consideration, and received the opinion of his Majesty's Attorney-general, the Lord Advocate of Scotland, and his Majesty's Solicitor-general thereupon, is pleased, with the advice of his privy-council, to order, that, for the restoring the peace and good government of the said borough, the inhabitant burgeses of the said borough, who resided there on the 18th of September 1765, and heritors who, on the said 18th day of September 1765, were liable in, and did bear, and shall, upon the day of the poll-election, be liable in, and bear a part of the public burdens of the said borough, (excluding honorary burgeses, servants, and pensioners of the town, or of any corporation within the same, and others who are now, or shall be under any legal incapacity of acting at such election) be, and they are hereby authorised and commanded to assemble themselves at the council-chamber within the said borough of Anstruther-Wester, at ten o'clock in the forenoon, upon Wednesday the 15th day of July next, with continuation of days, of which the sheriff-depute of Fife-shire is hereby required to give public notice, eight days before the day of election, then and there to elect fit persons,



persons, (not exceeding fifteen in number, being the number elected at Michaelmas 1764), properly qualified in terms of the sett and usage of the said borough, to be magistrates and town-counsellors of the same; and that the persons so to be elected by a majority of the burgeses resident in the said borough, on the said 18th day of September 1765, and heritors aforesaid, shall continue from that time magistrates and counsellors, till the usual time of election in the current year 1767, and that all persons claiming to vote as burgeses do give their burges-tickets, or authentic extracts from the records of this borough, of their admission to the freedom thereof, and that the said heritors do likewise give in certificates, under the hands of the collector of the public burdens of the said borough, or other satisfactory evidence of their being liable in, or bearing a part, on the said 18th September 1765, in respect of the lands and tenements upon which they shall claim a right to vote at the poll-election, and that they are then liable in, and do bear a part of the public burdens of the said borough of Anstruther-Wester, six days at least before the day of election, to the said sheriff-depute, or his clerk, that their names may be called before the election; And that the sheriff-depute of Fife-shire, (within which the borough lies), the sheriff-depute of Perth-shire, and the sheriff-depute of Mid-Lothian, being the two adjoining counties to Fife-shire, or any two of them, be, and they are hereby authorised and required to attend, oversee, and direct such election, according to law, and the rules used to be observed in such cases, and to form an authentic instrument thereupon, under their subscription manual, to be reported to his Majesty in council, for his royal confirmation, and that they

do administer to the electors, before they be admitted to poll, the oaths appointed by law to be taken in Scotland, by the electors at ordinary elections of magistrates, and likewise the oath against bribery and corruption, if required by any person having a right to vote at the said election. Of all which the persons afore named, and all others whom it may concern, are to take notice, and pay due obedience hereto.

N U M B E R XII.

FORM of a Precept from a Sheriff to a  
Borough.

**A. B.** Esquire, Sheriff-depute (or substitute) of the  
county of \_\_\_\_\_ to  
the magistrates and town-council of the  
royal borough of \_\_\_\_\_

Whereas, by a writ of election, to the parliament to be holden at the city of Westminster, on the

day of    directed to me, and bearing  
test the                                      day of                                      I am

commanded, that, of every royal borough of the afore-  
said county, I freely and indifferently cause to be elected  
one commissioner, to elect one burgess, of the most dis-  
creet and sufficient, for the class or district, according to  
the form of the statutes thereupon made and provided, as  
in the said writ at more length is contained; herefore I  
require and ordain you, that, with all convenient speed,

ye freely and indifferently elect one commissioner (in the same manner as you was in use to elect commissioners to the parliament of Scotland) in order to elect a burges for the class or district of boroughs whereunto your borough does belong, of the more discreet and substantial men; and that ye order the said commissioner, so to be elected by you, to repair to the presiding borough of the said class or district, upon the day of (being the thirtieth day from the test of the said writ) and then and there to elect the said burges to parliament, according to the form of the statutes thereupon made and provided, and in terms of the said writ. Given under my hand and seal at the day of 17 years, and of his Majesty's reign the year,

N U M B E R XIII.

F O R M of a Commission from a Borough to a Commissioner to vote for a Burges to serve in Parliament.

I N a council of the borough of holden in the court-house thereof, being the ordinary place where the council uses to sit, the day of on thousand seven hundred and years: The which day the magistrates and council of the said borough of being convened, in obedience

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ence to a precept directed to them by

Esq; sheriff-depute of the sheriffdom of  
of the date the day of re-  
quiring them to elect a commissioner for the said bo-  
rough, as they used formerly to elect a commissioner to  
the parliament of Scotland, and ordering the said com-  
missioner to meet within the town-house of the borough  
of being the presiding borough of the  
class or district, upon the day of

at twelve of the clock in the forenoon, with the  
rest of the commissioners chosen for the several boroughs  
of the said district, and there to vote for and elect a bur-  
gers, out of the discreetest and most sufficient, freely and  
indifferently, for representing the said district in the en-  
suing parliament of Great Britain, to be held at West-  
minster upon the day of next, by a  
writ directed to the sheriff of the shire of

bearing date at Westminster day of  
last; the said magistrates and council, being all qualified  
conform to law, and having heard read the act of parlia-  
ment against bribery and corruption, did unanimously  
(or by a majority) elect and chuse, and hereby elect and  
chuse whom they testify to be a

man fearing God, of the true protestant religion now pu-  
blicly professed and authorised by the laws of this realm,  
expert in the common affairs of this borough, and a bur-  
gers thereof, their very lawful and undoubted commis-  
sioner to the effect underwritten, giving, granting, and  
committing to him their full power, for them, and in  
their names, and upon their behalfs, to meet and con-  
veen within the said town-house of as  
being the presiding borough of the class or district of bo-  
roughs

(Signed)

## XIV.

and a Clerk of a presiding Borough.

common



for chusing each of them a commissioner or delegate to the effect under written, and ordering the respective commissioners to meet at the said borough of  
as the presiding borough for the time, of the class or district of boroughs above mentioned, upon the day and date of these presents, being the thirtieth day after the test of his Majesty's writ of election aforesaid, and to chuse a burgess for the said district to represent them in the ensuing parliament, to be holden at the city of Westminster upon the day of

next. The commissioners chosen for the boroughs aforesaid, being this day met in the council-house of the said borough of the presiding borough at the said election, did, by an unanimous vote, (or by a majority of votes), of the said commissioners, who produced commissions duly authenticated, freely and indifferently chuse and elect E. F. Esq; a burgess of the borough of to attend and serve in the ensuing parliament of Great Britain, for the said class or district of boroughs above mentioned, giving

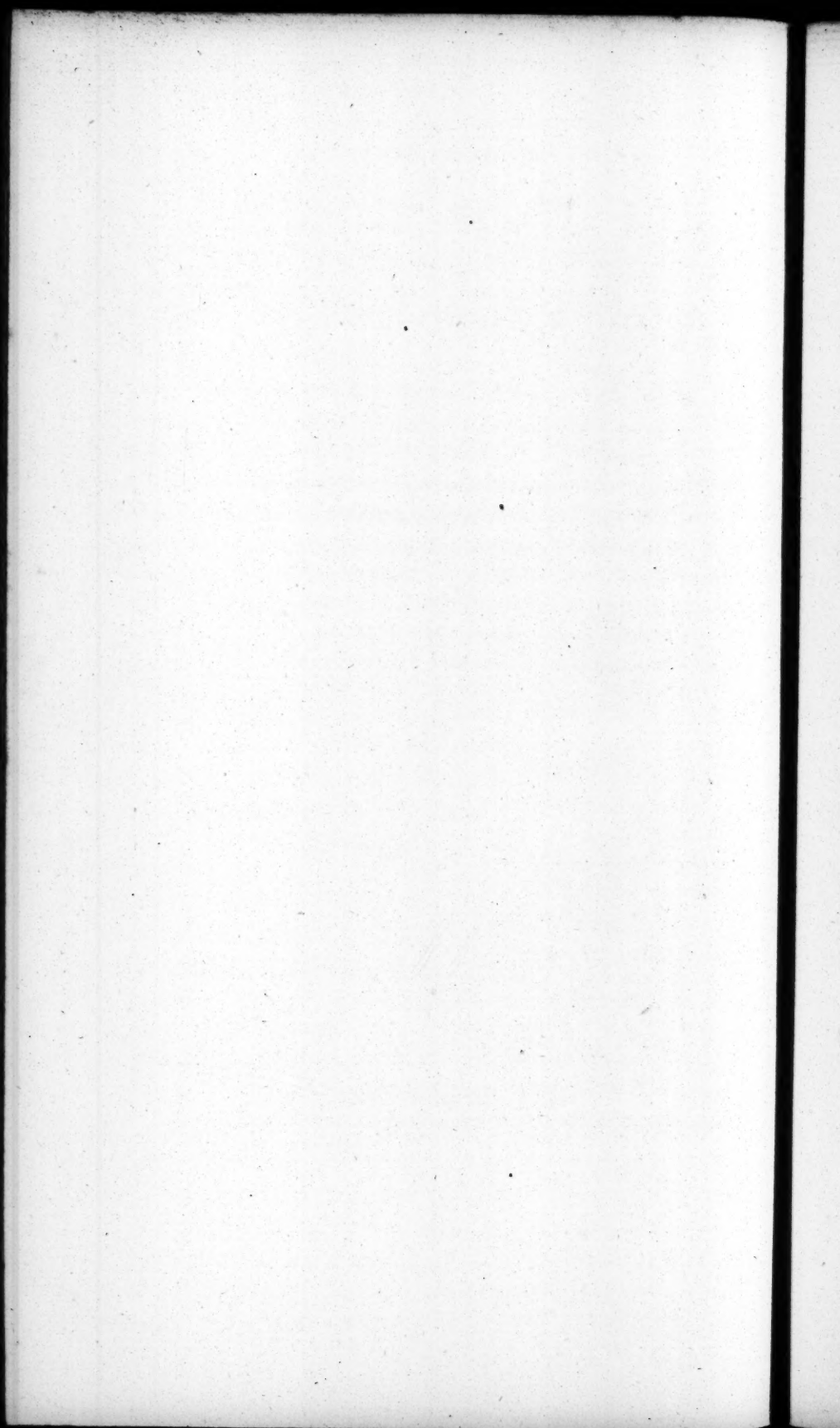
ving and granting to the said E. F. full and sufficient power for himself, and the commonalty of the said class or district, to do and consent to those things which then and there shall happen, by the common council of the kingdom, (by the blessing of God), to be ordained upon the affairs mentioned in the said writ. In witness whereof, to the one part of these presents, remaining with the said A B. Esq; to be annexed to and returned with his Majesty's writ of election aforesaid, directed to the sheriff of the said shire of he the said A. B. and C. D. have set their hands and seals; and to the other part remaining with the said C. D. for the use of the district of boroughs before mentioned, the said A. B. has also set his hand and seal, place, day, month, year of God, and king's reign aforesaid.

## E R R A T A.

- Page 33. line 6. *for* 1426 *read* 1427.  
75. line 9. *after* privy-seal *add* the master of requests.  
91. line 2. *for* commons *read* commoners.  
106. in the note, *for* § 4. *read* § 8.  
194. line 18. *for* tenor *read* tenure.  
237. line 22. *for* however *read* how.  
302. in the note, *after* § *add* 1:  
348 catchword, *for* within *read* its.  
350. line 21. *after* for *add* a  
ib. line 24. *for* a *read* the









# I N D E X.

## A

**A**DJUDGERS have no vote during the legal reversion, p. 39, 216.

— may vote after expiration of the legal, provided they be in possession; but, if more than one upon the same lands, the first inest alone can vote, 217.

Alteration of circumstances, what sufficient to authorise turning a person off the roll, 264, *et seq.*

Articles, Lords of, 62.

Articles and supplications to be delivered to the clerk-register, to be by him presented to a convention appointed to meet 20 days before the parliament, 71.

Articles, committee of, declared a grievance, and abolished, 77.

## B

Bagimont's roll, 154.

Bribery and corruption; the effect of, 332 to 340.

Bribe given to a wife, without the knowledge of her husband, does it disqualify the husband? 340.

— Are those who ask, but do not receive a reward for their votes, disqualified? 341.

Boroughs royal, possessed of lands holding of the King, can they vote in the election of a commissioner from the shire? 198.

Magistrates and counsellors of royal boroughs, how chosen, 319.

Boroughs royal. Magistrates and counsellors of, must be annually elected; and if the election does not proceed on the proper day, none take place, without a warrant for a poll, p. 320.

———Not lawful for the minority to separate from the majority, 322.

———Lawful to any constituent member, at any meeting for election of magistrates or counsellors, or of any previous meeting, who shall apprehend any wrong to be done by the majority of such meeting, to complain to the court of session, 324.

———Within what time must such complaint be preferred.—Case of Pittenweem, 326.

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